87-374

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

———

CHOTIN TRANSPORTATION, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

———

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QUESTIONS PRESENTED

1. The Rivers and Harbors Act has been judicially interpreted to grant to the United States a "strict liability" remedy against Chotin. Does the government's judicially created "strict liability" remedy extend to damages that the government itself negligently causes:

a. When there exists no statutory language to this effect; and

b. When such a rule is contrary to settled admiralty law and policy?

2. Or, alternatively, is such "strict liability" remedy confined to damages that Chotin' vessel inflicts upon the government's lock, without regard to whether Chotin's agents were guilty of or free from negligence in causing such damages?

3. Does the doctrine of comparative fault apply to the government's Rivers and Harbors Act claim to reduce its damages by the percentage the government's own negligence contributed to its own injuries?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	12
APPENDIX:	
En Banc Panel Opinion	1a
District Court Opinion	29a
Three-Judge Panel Opinion	50a
Order Granting Petition for Rehearing	73a
Order of the District Court	75a
Full Text of Statutory Provisions Involved	76a

TABLE OF AUTHORITIES

Cases:	Page
Harden v. *Gordon*, 11 F.Cas. 480 (C.C. Me. 1823)	10
Lewis v. *Timco, Inc.*, 716 F.2d 1425 (5th Cir. 1983)	11
Moragne v. *State Marine Lines*, 398 U.S. 375 (1970)	8-9
Pan-Alaska Fisheries, Inc. v. *Marine Construction and Design Co.*, 565 F.2d 1129 (9th Cir. 1977)	11
Pope & Talbot v. *Hawn*, 346 U.S. 406 (1953)	11
Schooner Catherine v. *Dickenson*, 58 U.S. 170 (1854)	9
Seas Shipping Co. v. *Sieraki*, 328 U.S. 85 (1946)	11
The Harrisburg, 119 U.S. 199 (1886)	9
United States v. *Central Soya, Inc.*, 697 F.2d 165 (7th Cir. 1982)	2
United States v. *Logan & Craig Charter Service*, 676 F.2d 1216 (8th Cir. 1982)	2
United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975)	9-10
Wyandotte Transportation Company v. *United States*, 389 U.S. 191 (1967)	4, 7

Statutes and Regulations:	
33 C.F.R. § 207.300(a)	5
33 U.S.C. § 1	5
Rivers and Harbors Act, 33 U.S.C. §§ 408, 412	2, 3, 6
33 U.S.C. §§ 1801, 1802	12
Federal Employees' Liability Act, 46 U.S.C. §§ 51-60	7-8
Jones Act, 46 U.S.C. § 688	7-8
Suits in Admiralty Act, 46 U.S.C. §§ 741-752	2
Death on the High Seas Act, 46 U.S.C. §§ 761-768	7-8

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OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Tennessee, is unreported. The three-judge panel decision of the United States Court of Appeals for the Sixth Circuit is reported at 784 F.2d 206. The en banc decision of the Sixth Circuit Court of Appeals is reported at 819 F.2d 1342. All three opinions and the order granting the petition for rehearing appear in the Appendix.

STATEMENT OF JURISDICTION

The decision of the three-judge panel of the Court of Appeals for the Sixth Circuit was rendered February 19, 1986. The United States filed a petition for rehearing en banc which was granted on June 17, 1986. The decision of the *en banc* panel of the Court of Appeals for the

Sixth Circuit was rendered June 5, 1987. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The full text of the applicable statutes appears in the Appendix.

STATEMENT OF THE CASE

This action arises out of an allision between a vessel owned by petitioner, Chotin Transportation, Inc. (Chotin), and the upper gate of the Wilson Lock, a government-owned and operated structure situated on the Tennessee River. Chotin filed its action against the United States seeking recovery for damages to its vessel sustained in the casualty. Chotin based its suit upon the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, and claimed that the casualty at issue was caused by the negligence of the United States.

The United States, by way of counterclaim, sued Chotin's vessel, *in rem* [1] alleging that the vessel was "strictly liable" [2] under the Rivers and Harbor Act, 33 U.S.C. §§ 408 and 412, for all damages inflicted upon Wilson Lock in the accident.

Following a bench trial, the District Court found that Chotin and the United States were each 50% negligent. The lower court reduced Chotin's stipulated damages by 50%, the amount of negligence attributable to it, and awarded Chotin judgment for its full damages less 50%.

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[1] The government's *in rem* suit is governed by Rule C(1)(b) of the Supplemental Rules for Certain Admiralty and Maritime Claims.

[2] The Rivers and Harbors Act has been judicially construed to grant to the United States a "strict" liability remedy against vessels that damage government works. In a suit of this nature, these cases hold that the government is not required to prove negligence and/or fault as a condition to recovery. *See United States* v. *Central Soya, Inc.*, 697 F.2d 165, 169 n.4 (7th Cir. 1982); *United States* v. *Logan & Craig Charter Service*, 676 F.2d 1216, 1219 (8th Cir. 1982).

The District Court refused, however, to reduce the United States' damages by the amount of its negligence. Instead, the United States was permitted to recover 100% of its stipulated damages, even though its own negligence caused 50% of the damages.[3]

The District Court based this ruling on several Courts of Appeals' decisions that decreed that the Rivers and Harbors Act granted to the United States a "strict liability" remedy against Chotin's vessel. Because the United States possessed a "strict liability" remedy against Chotin, the District Court reasoned, the government's negligence which produced 50% of its own damages was irrelevant, and did not reduce the amount of the government's recovery.

Chotin timely perfected an appeal to the United States Court of Appeals for the Sixth Circuit. On February 19, 1986, a three-judge panel reversed the District Court, holding that the doctrine of comparative fault was applicable to the government's Rivers and Harbors Act "strict liability" claim. In particular, the three-judge Sixth Circuit panel ruled that the United States was economically responsible for the negligence of its employees, and, consequently reduced the government's damages in proportion to the percentage of negligence found against it.

The United States then petitioned for rehearing *en banc*, which was granted. After oral argument, on June 5, 1987, ten of sixteen judges on the Court of Appeals for the Sixth Circuit affirmed the District Court, ruling that sections 408 and 412 of the Rivers and Harbors Act imposed strict liability on Chotin and obligated Chotin to pay for 100% of the government's damages, including those damages caused by government negligence.

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[3] Chotin's stipulated damages were $219,915.32. The United States' stipulated damages were $246,332.42. Chotin recovered 50% of its damages, $109,957.66, while the government was awarded $246,332.42, the full amount claimed.

Chotin here seeks review of that ruling.

REASONS FOR GRANTING THE WRIT

To permit the United States to recover 100% of its damages, though government negligence produced 50% of those damages, would produce a result, which is "extraordinary in our jurisprudence." In the annals of American jurisprudence, no court has ever conferred upon any maritime litigant the remedy that the Sixth Circuit granted to the United States by the decision below. There exists no maritime case, including strict liability actions, petitioner submits, which allows a 50% negligence party plaintiff to recover 100% of its damages.

Indeed such a remedy violates well-defined legal principles adopted by this Court. In *Wyandotte Transportation Company* v. *United States*, 389 U.S. 191 (1967), a private party negligently sank barges in a navigable waterway. The government salvaged the barges, and relying on provisions of the Rivers and Harbors Act, sued to recover its salvage expenses. The private parties took the position that the Rivers and Harbors Act did not permit the government to recover its wreck removal expenditures. This Court disagreed, stating:

> . . . denial of such a remedy to the United States would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim."

Id. at 204.

The Sixth Circuit's ruling shifts responsibility for the consequences of the government's 50% negligent conduct from the United States to Chotin. Such ruling renders Chotin liable for government damages caused by government fault. No other 50% negligent claimant/litigant can recover 100% of its damages. The Sixth Circuit's ruling indeed is "extraordinary in our jurisprudence," and must be reversed.

The unique rule of law fashioned by the Sixth Circuit, if allowed to stand, will have far-reaching adverse impact on Inland River vessel owners and operators.

A vessel which makes a round trip from St. Louis Missouri, to St. Paul, Minnesota, on the Mississippi River, for example, must pass through 54 government operated locks. There are 20 locks between Cairo, Illinois and Pittsburgh, Pennsylvania on the Ohio River. The Tennessess River has 9 locks, as does the Illinois River. The government operates locks on the Allegheny, Arkansas, Cumberland, Green, Monongahela, and Kanawha Rivers. There are locks located on the Gulf Intercoastal Waterway and the Warrior-Tombigbee System.

Navigation through government operated locks is virtually a daily exercise by many Inland River vessel operators.

The United States, by statute [4] and regulations [5] promulgated pursuant to statute, rigidly controls the use of its locks by vessel operators such as Chotin. One regulation, by way of example, provides:

> No one shall cause movement of any vessel, boat, or other floating thing in the lock or approaches except by and under the direction of the lock master or his assistants.

33 C.F.R. § 207.300(a).

A series of laws and regulations that gives the government virtually absolute authority to regulate vessel behavior in and around government locks but renders vessel operators absolutely liable to the United States for physical damages inflicted on the lock itself by government negligence in the exercise of that authority is, in a word, outrageous.

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[4] 33 U.S.C. § 1, *et seq.*

[5] 33 C.F.R. § 207.300, *et seq.*

The rule of law promulgated by the Sixth Circuit cannot stand. Vessel owners like Chotin have absolutely no control over the behavior of government lock operators, though such operations can rigidly control the activities of vessel crewmembers. Chotin should not be economically responsible for the consequences of government conduct, over which it has no control.

Moreover, the section of the Rivers and Harbors Act relied upon by the Sixth Circuit lends no support to its ruling. Congress expressly provided that Chotin's liability to the United States is limited to damages "done by" Chotin's vessel.[6]

Fifty percent of the government's damages were "done by" negligence on the part of the government. This statute confers no right upon the government to recover damages "done by" the government itself.

Although several lower courts have decreed that the Rivers and Harbors Act imposes "strict" liability on Chotin's vessel without regard to the fault of such vessel, the government's judicially created "strict liability" remedy does not, as a matter of statutory construction and fundamental fairness, extend to damages inflicted upon a government structure by the negligence of government employees. On the contrary, this statute clearly states, the government's "strict liability" remedy is limited to damages "done by" Chotin's vessel.

A construction of this statute, which subjects the government to the economic consequences of the negligence of its employees, is compelled by the language itself.

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[6] The applicable statute states:

> Any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of §§ 407, 408 and 409, *shall be liable . . . for the amount of damages done by said boat, vessel, scow, raft, or other vessel . . .*

33 U.S.C. § 412.

Such construction is not only consistent with *Wyandotte*'s admonishment against ". . . a wrongdoer shifting responsibility for the consequences of his negligence on to his victim," but also accords with settled, uniform principles of maritime law and policy. It is the only statutory interpretation that produces a fair, as distinguished from a blatantly unfair, result in this case.

The Sixth Circuit sought to justify its decision in this case on the perceived intent of Congress in passing the Rivers and Harbors Act. The Court imputed to Congress, in passing the Act, an intent to confer upon the United States a "strict liability" remedy which did not permit reduction for damages caused by government fault. Yet the Act does not mention the words strict liability, and, more importantly, says nothing about the effect of government fault on the government's ability to collect damages inflicted on a government work by a private party's vessel. The Congressional intent, articulated by the Sixth Circuit, cannot be gleaned from a reading of the applicable statute itself, is inconsistent with the statute, and is refuted by other action taken by Congress in passing other maritime legislation.

The section of the Rivers and Harbors Act, relied upon by the Sixth Circuit, was passed by Congress in 1899. In 1920, Congress enacted the Jones Act, 46 U.S.C. § 688, which incorporates by reference the provisions of the Federal Employees Liability Act, 46 U.S.C. §§ 51-60 (FELA). Under the Jones Act, through applicable portions of FELA, proportional fault reduces a seaman's damages ". . . in proportion to the amount of negligence attributable to such employee." 46 U.S.C. § 53. In passing the Jones Act, Congress made a policy judgment that proportional fault was a fair way to treat seamen, who were injured or killed in maritime employment, and who sought to recover damages from their employers.

Congress also passed the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-768. This Act provides an

admiralty wrongful death remedy for persons killed, ". . . beyond a maritime league from the shore of any state . . . of the United States . . ." In passing this Act, Congress likewise expressly adopted the rule of proportional fault. Claims by persons who pursue this maritime statutory remedy are reduced by ". . . the degree of negligence attributable to the decedent . . ." 46 U.S.C. § 766. Again, the passage of this Act evidences a congressional policy judgment that persons who pursue admiralty claims must bear the consequences of their own negligence.

It is not reasonable to suggest that Congress, by passage of the Rivers and Harbors Act, intended to treat the United States better than seamen and/or claimants and/or death beneficiaries prosecuting claims under the Jones Act and Death on the High Seas Act.

Congressional action in passing the aforementioned maritime statutes, it should be added, is relevant to a determination of Congressional policy on this point. In *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970), for example, this Court looked to the FELA, the Jones Act, the Death on the High Seas Act, etc., and determined that such statutes made clear that no policy against allowing recovery for wrongful death existed. The Court observed:

> This Legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction, but also in those of decisional law.

398 U.S. at 390-91.

The foregoing Acts evidence a Congressional policy which favor application of the doctrine of comparative fault to the government's "strict liability" suit. These Acts support a policy to the effect that maritime plaintiffs, who are guilty of negligence, are not foreclosed from recovery, but are, on the contrary, only entitled to recover for damages their own fault did not cause.

Chotin should recover no more than 50% of its damages because its agents were 50% at fault. The United States must be treated in like fashion. The government should recover no more than 50% of its damages, for its agents were also guilty of 50% fault.

This conclusion is compelled by the need for uniformity in maritime actions of this nature. In 1886, this Court ruled that maritime law did not afford a cause of action for wrongful death in *The Harrisburg*, 119 U.S. 199 (1886). Eighty-four years later, this Court overruled *The Harrisburg* in *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970). This Court's concern with ". . . a constitutionally based principle that federal admiralty law should be a 'system of law co-extensive with, and operating uniformly in, the whole country.' " 398 U.S. at 401 (citing *The Lottawanna*, 21 Wall. 558 (1875)) underpinned its decision in *Moragne*. This Court's references in *Moragne* to its ". . . strong concern for uniformity" in maritime matters; to the "uniform vindication of federal policies" in admiralty suits, and its desire to achieve "uniformity in the exercise of admiralty jurisdiction" are manifestations of that concern.

The lower court's decision is contrary to the principle, stated in *Moragne*, that federal admiralty law should consist of a uniform and consistent system of laws for the doctrine of comparative fault enjoys wide acceptance in maritime jurisprudence and the notion that a 50% at fault litigant can recover 100% of its damages is a stranger to maritime law.

In *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), this Court overruled an earlier decision which had governed maritime collision litigation for more than 120 years. In *Schooner Catherine* v. *Dickenson*, 58 U.S. 170 (1854), this Court adopted the rule of "divided damages" in maritime collision cases, which provided that whenever the negligence of two parties contributed to a

collision, each party bore one-half of the damages regardless of the degree of fault of each party.

In *Reliable Transfer* this Court expressly abandoned the "divided damages" rule in favor of the doctrine of proportional fault, which required allocation of damages, on a percentage basis, in proportion to the relative fault of each involved party. In adopting the proportional fault rule, this Court reasoned that the doctrine of "divided damages" was inherently unfair and produced "palpably unfair results." Coincidentally, the government was a party before the Court in *Reliable Transfer* and took the position that the rule of divided damages "should be replaced by the more equitable proportional fault rule." Brief of United States, 44 L.Ed.2d 800, 801.

It is indeed manifestly wrong to divide damages on a 50/50 basis, regardless of the degree of fault of each party. It is obviously even more egregious to refuse to divide damages at all, regardless of the degree of fault. *Reliable Transfer* corrected the inequities produced by the divided damages rule by adopting in the rule of proportional fault for maritime collisions. This rule should be applied to the government's strict liability suit.

The fact that the government possesses a judicially created "strict liability" remedy does not insulate the government from economic responsibility for its own negligence, for admiralty law favors the doctrine of proportional fault in a strict liability context.

Perhaps the clearest example of the strong maritime policy favoring apportionment of fault can be found in the admiralty law's treatment of seamen,[7] or maritime

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[7] Seamen enjoy a special status under settled principles of admiralty law. Justice Story has described such status as follows:

> Every court should watch with jealousy any encroachment upon the rights of seamen, because they are unprotected and need counsel. . . . They are emphatically the wards of admiralty.

Harden v. *Gordon*, 11 F.Cas. 480 (C.C. Me. 1823).

workers, who sustain personal injury or are killed during the course of maritime employment. A shipowner-employer owes a warranty of seaworthiness to these workers, which is a species of strict liability in the sense that it imposes liability without fault. *Seas Shipping Co.* v. *Sieraki*, 328 U.S. 85, 94 (1946). Nevertheless, the admiralty law charges seamen with the consequences of their own fault because it reduces the seaman's recovery by the percentage of his own fault. *Pope & Talbot* v. *Hawn*, 346 U.S. 406, 408-09 (1953).

Obviously, if a seaman's "strict liability" personal injury or death claim must be reduced by the degree of his own negligence, it is wholly illogical to suggest that comparative fault should not reduce a claim for physical damage to a government-owned lock brought by the United States under the Rivers and Harbors Act. Seamen, as stated, enjoy a preferential status in the law. The United States does not enjoy such status. The Sixth Circuit's ruling has the remarkable effect of placing the United States in a more favorable posture than seamen occupy.

Another example of admiralty's preference for the doctrine of comparative fault in a "strict liability" context exists in the maritime products liability area. The doctrine of strict liability in tort, as described under Restatement of Torts (2d) § 402A, has been extended into the law of admiralty. The doctrine of comparative fault has been applied to these strict liability remedies. *Pan-Alaska Fisheries, Inc.* v. *Marine Construction and Design Co.*, 565 F.2d 1129, 1139 (9th Cir. 1977); *Lewis* v. *Timco, Inc.*, 716 F.2d 1425, 1433 (5th Cir. 1983).

The Sixth Circuit undertook to rationalize its decision, in part, on public policy grounds. Public policy, the lower Court reasoned, obligated Chotin to reimburse the United States for *all* damages the government sustained, regardless of government negligence, in order to provide

funds for maintenance and repair of government operated aids to navigation.

Congress, however, has provided such funding by 33 U.S.C. § 1801, *et seq.*, a statute which imposes a user tax on liquid marine fuels, to be used "for making construction and rehabilitation expenditures for navigation on the inland and intracoastal waterways of the United States . . ." 33 U.S.C. § 1802. The existence of this fund eliminates any public policy basis for the lower court's erroneous construction of the Rivers and Harbors Act.

Simply stated, there exists no valid reason to make Chotin an insurer of the negligent conduct of employees of the government.

CONCLUSION

The doctrine of proportional fault should be applicable to all maritime tort actions brought by any party under maritime law. Such a rule would do no violence to the Rivers and Harbors Act "strict liability" remedy that has been judicially conferred upon the United States, for there exists no valid reason to extend such "strict liability" remedy to include acts of government negligence which cause government damage.

The United States should be treated no better than every other admiralty litigant. The amount of its damages should be reduced by the percentage of negligence committed by its agents.

There exists no valid reason why Chotin should be required to pay for damages caused by the negligence of government employees, over whom Chotin has no control.

This petition should be granted to enable this Court to decide these issues of maritime law that are vitally important to every vessel operator whose vessels traverse the Inland Waterways of the United States and pass

through government owned/operated and exclusively controlled locks and dams.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 84-5652, 85-5138

CHOTIN TRANSPORTATION, INC.,
Plaintiff-Appellant,
Cross-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,
Cross-Appellant.

On Appeal from the United States District Court
for the Middle District of Tennessee

Decided and Filed June 5, 1987

Before: LIVELY, Chief Judge; ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD, MILBURN, GUY, NELSON, RYAN, BOGGS, NORRIS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

KRUPANSKY, J., delivered the opinion of the court, joined by LIVELY, C.J., ENGEL, KENNEDY, WELLFORD, GUY, NELSON, RYAN, BOGGS and NORRIS, JJ. MILBURN, J., (pp. 19-27) delivered a separate opinion concurring in part and dissenting in part, joined

by KEITH, MERRITT, MARTIN and JONES, JJ. EDWARDS, SJ, (p. 28) delivered a separate opinion concurring with MILBURN, J.'s dissent.

KRUPANSKY, Circuit Judge. The plaintiff-appellant Chotin Transportation, Inc. (Chotin) appealed, and the defendant-appellee United States of America (government) cross-appealed from the district court's order awarding the United States $136,374.51 in damages plus prejudgment interest in this admiralty action commenced pursuant to the Suits in Admiralty Act (SIAA), 46 U.S.C. §§ 741-752.

The record disclosed the following facts, which were not in dispute. On January 20, 1982, the Chotin tug M/V Francis R. Keegan, Barge Chotin 1794, and Barge Chotin 3390, were moving upstream on the Tennessee River which required passage through the Wilson Lock. The lock is the property of the United States and is operated by the Army Corps of Engineers, an instrumentality of the United States. Barge 3890 was the lead barge followed by Barge 1794 and the tug. The barge train reached the lock on the evening of January 20 during deteriorating weather conditions with restricted visibility occasioned by a dense fog and heavy rain.

The captain and pilot of the tug, Paul Horton (Horton), radioed Ivan Wallace (Wallace), the single lock operator on duty that night, for permission to enter the lock. Horton advised Wallace that the flotilla was 586½ feet in length, whereupon Wallace opened the 600 foot lock's downriver "miter" [1] gates and authorized Horton to move the flotilla into the lock chamber.

The barge train was maneuvered into the lock and placed along the lock chamber's river wall on the star-

[1] A "miter" gate is a hinged wing gate that opens into the locks chamber and is flushed into the chamber walls when in the fully open position.

board side of the tug and barges. Wallace, who was in the lock's lower land wall control station, then instructed Horton to move the flotilla to the land wall on the port side of the vessels. Horton complied, and the vessels were brought to a stop four to five feet from the upper "lift" [2] gate which afforded sufficient clearance to close the downriver miter gates, and in the judgment of the tug's crew, provided adequate distance for the bow of the lead barge, Chotin 3390, to clear the upriver life gate. The tug's crew secured the tug and barges to the land wall. Lines were connected from "floating mooring bits" [3] on the chamber wall to deck fittings on the vessels to prevent forward and backward movement of the barge train within the lock. After both lines had been secured, and the tug's throttles had been placed in the neutral position to equalize the stress on both lines, Horton reported to Wallace that the tug and its barges had been "tied-off" on the land wall of the chamber.

Wallace had observed the stern of the tug and the crew as it secured the flotilla from a distance of approximately 90-100 feet from the lower wall control station. Convinced that the flotilla had been secured to permit the downstream miter gates to close, Wallace closed the gates. At that point in time the tug and barges could have been moved astern to permit a greater clearance between the head of the flotilla and the upstream lift gate once the downstream miter gates were closed. Horton, however, left the vessels secured as they had been initially tied off along the chamber land wall.

By the time the downstream miter gates had been closed, the fog had become more dense, and, as a result of the reduced visibility, Wallace could no longer view

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[2] A "lift" gate opens by moving upward within its tracks situated on each wall of the lock chamber.

[3] "Floating mooring bits" are floating tanks in the lock wall which allow the flotilla's lines to rise and fall with the water level in the lock.

the mooring lines nor the clearance between the flotilla and the upstream lift gate. Wallace nevertheless opened the lock's intake valves from the lower land wall control station permitting water to enter the chamber.

After he had opened the valves, he walked along the land wall to examine the mooring lines, but was unable to do so because of the dense fog. Wallace thereupon proceeded, via motor scooter, to the lock's main operations building which was situated between the downriver and upriver control stations where he obtained a newspaper for the tug's crew. He thereafter continued to the second mooring bit approximately 126 feet downriver from the upstream lift gate. The mooring lines were not visible at that position so he proceeded to the first mooring bit approximately 54 feet downriver from the upstream lift gate. The mooring lines were still not visible so he decided to close the intake valves and stop the flow of water into the lock. To implement this decision he proceeded to the upper land wall control station where additional control valves were located, but because of his haste in attempting to enter the station, he experienced time-consuming difficulty in positioning his key to turn the lock to gain entry into the facility.

During the time Wallace was travelling from the lower to the upper land wall control stations, the flotilla experienced two episodes of "surging" which caused the flotilla to move forward and backward in the lock chamber. The first surge occurred when water was initially introduced into the lock. During that episode, a crew member retied the towing line to remove slack, and Horton engaged the tug's starboard engine astern to hold the flotilla in place. The surging stopped as the flow of water into the chamber stabilized and the water level continued to rise. After the surging had ceased the tug's crew checked the clearance between the bow of Barge 3390 and the upstream lift gate and erroneously concluded that its bow would clear the gate.

Approximately eight minutes later, the second episode of surging occurred when the water intake valves automatically increased the water flow into the chamber. The second surging continued for approximately six to eight minutes. Horton failed to advise Wallace of either incident.

When the water level in the lock had raised the barge train to within a few feet below the upstream lift gate, the tug's first mate realized that the bow of Barge 3390 would collide with the gate. Another crew member reported that impact was imminent. The first mate radioed Horton of the danger, and Horton engaged the tug's engines astern in an effort to back-off the flotilla from the upstream lift gate. He then radioed Wallace to close the water intake valve; however, the impast was unavoidable. The bow of Barge 3390 struck the upstream lift gate, and, as the water continued to rise, became wedged under the gate causing the coupling between Barge 3390 and Barge 1794 to break and the bow rake of Barge 3390 to disconnect, damaging the lock chamber and the barge.

Chotin commenced this action under the SIAA, 46 U.S.C. §§ 741-752, in the United States District Court for the Middle District of Tennessee, wherein it alleged that the negligent operation of Wilson Lock by the government caused damage to its Barge 3390. The government counterclaimed against Chotin for negligence which caused damage to the upstream lift gate, and in a related third-party *in rem* action charged the tug Keegan, Barge 1794, and Barge 3390 with negligence that resulted in damage to the same upstream lift gate. The third-party *in rem* action was initiated pursuant to the Rivers and Harbors Act, 33 U.S.C. §§ 408 and 412. The parties stipulated their respective monetary damages. At the conclusion of a bench trial, the government dismissed its *in personam* negligence claim and elected to proceed on its *in rem* action against Chotin.

The trial court, having invoked maritime comparative negligence principles in considering Chotin's claim against the government, concluded that each was 50% negligent in causing the collision between Barge 3390 and the upstream lift gate. The court decided that the government was negligent because Wallace had breached his duties as lockmaster to control and manage the lock and to supervise the mooring operations of the barge train adequately, *see* 33 C.F.R. § 207.300, and that Chotin was negligent in failing to operate the tug and barges properly while the flotilla was in the lock. The court thereupon assessed 50% of Chotin's damages to Barge 3390 against the government. In addressing the government's *in rem* claim against Chotin, the court determined that the *in rem* third-party defendants were strictly liable to the United States under 33 U.S.C. §§ 408 and 412 for the total damage to the upstream lift gate. Judgment was entered for the government for a net recovery of $136,374.51 plus prejudgment interest.

Chotin thereupon timely appealed that part of the district court's judgment which held it to be liable for the total amount of the damage to the upstream lift gate of the district court's judgment which imposed 50% liability against it for the damages to Barge 3390. A panel of this court affirmed the district court's decision which assessed 50% of the damages to Barge 3390 against the United States, but reversed that part of the judgment which concluded that the *in rem* third-party defendants were strictly liable for the damages of the upstream lift gate. *Chotin Transp., Inc. v. United States*, 784 F.2d 206 (6th Cir. 1986). Upon the motion of the government for reconsideration, this court vacated the panel's decision, 793 F.2d 136 (6th Cir. 1986), and assigned the case for en banc hearing.

On the initial appeal to this court, the government had argued that Wallace's negligent acts were within the perimeters of the discretionary exception of the Federal

Tort Claims Act, 28 U.S.C. § 2680(a). The panel unanimously agreed that the exemption did not apply because a factual analysis disclosed that the lockmaster's breach of duty had not resulted from a policy judgment or policy decision implicit to invoking the exemption as intended by Congress.

The government's reliance upon *United States v. S.A. Empresa De Viacao Aera Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660, *reh'g denied*, 468 U.S. 1226, 105 S.St 26, 82 L.Ed.2d 919 (1984), to support its application of the discretionary exemption to the facts of this case was misplaced. *Varig Airlines* reaffirmed the Court's earlier interpretation of § 2680(a) articulated in the seminal case of *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), *reh'g denied*, 347 U.S. 924, 74 S.Ct. 511, 98 L.Ed. 1078 (1954). In *Varig Airlines* the Supreme Court recognized that:

> As in *Dalehite*, it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception.

467 U.S. at 813, 104 S.Ct. at 2765.

Having made that pronouncement, the Supreme Court proceeded to define the criteria against which the facts of any given case should be compared in resolving the protection afforded by the discretionary exemption imposed by the Federal Tort Claims Act, 28 U.S.C. § 2680(a), by stating:

> From the legislative and judicial materials, however, it is possible to isolate several factors useful in determining when the acts of a Government employee are protected from liability by § 2680(a). First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. As the Court pointed out in *Dalehite*, the exception covers

> "[n]ot only agencies of government . . . but all employees exercising discretion." 346 U.S., at 33, 73 S.Ct., at 966. Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability.
>
> Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.

Id. at 813-14. The inexhaustible line of citations relied upon by the government in its initial appeal simply emphasized the ad hoc application of facts to the *Varig Airlines* criteria to identify the exception.

Enjoining the dictates of *Varig Airlines* upon the developed facts of the instant case, this en banc court concludes that the lockmaster's negligence on the night of January 20, 1982 did not involve executive and/or administrative decisions anchored in social, economic, and political policies of the kind that Congress intended to safeguard from judicial section-guessing. In the case at bar, the government had exercised its policy by promulgating regulations to ensure the safe passage of vessels during the locking procedures. It was the lockmaster's negligent performance in ignoring the government's regulations that gave rise to the government's negligence in causing damage to Chotin's barge.

The government's attenuated interpretation of *Varig Airlines* would have this court extend the discretionary exemption, without exception, to all governmental activities undertaken by governmental employees under circumstances involving the exercise of judgment. In noting that pragmatically all negligent conduct, to a greater or lesser degree, is the product of a voluntary election to

perform or not perform an act, this en banc court observes that the government's suggested interpretation would confer the discretionary exception on all governmental activities and conduct that permitted or required the exercise of an election or option, which interpretation would be in derogation of the congressional intent incorporated into the FTCA and SIAA. In *General Pub. Util. Corp. v. United States*, 745 F.2d 239, 245 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1227, 84 L.Ed.2d 365 (1986), a post-*Varig Airlines* case, the Third Circuit demonstrated its understanding of *Varig Airlines*:

> The exemption from the Tort Claims Act is based on the nature of the governmental discretionary function, not whether there is an option to choose. Regulatory activities are within the exemption, not because alternatives exist in particular circumstances, but because of the fundamental character of the role assigned to the agency.

Likewise, in *Canadian Transp. Co. v. United States*, 663 F.2d 1081 (D.C. Cir. 1980), the D.C. Circuit recognized the existence of a discretionary function exception in the SIAA:

> The government appears to argue that if an action involves the exercise of judgment by a government employee the action is discretionary and the United States is immune from suit. . . . Courts have recognized, however, that giving such a broad reading to the term "discretionary" would effectively immunize almost all government activity from suit under the FTCA.

663 F.2d at 1086. The government's proposed interpretation would effectively eviscerate the legislative intent reflected in the FTCA and the SIAA. In the case at bar, the lockmaster abdicated his duties to immediately control and manage the locking procedure; to supervise the

mooring of the barge train to the lock; to supervise the tying of the backing and towing lines during lockage; to check the clearance between the head of the flotilla and the upstream lift gate after the captain of the Keegan informed him that the flotilla had been secured in the chambers; to discontinue the locking procedure when it was obviously dangerous; and to stop the flow of water into the chamber to prevent the disaster because he was unable to enter expeditiously the upper control station in time to close the necessary valves. Accordingly, this court concludes that the lockmaster's conduct did not fall within the discretionary exception of the FTCA as urged by the government on this appeal.

The record further disclosed that the crew of Chotin's tug Keegan was also negligent. No crew member monitored the slack in the mooring lines or the distance between the bow of Barge 3390 and the upstream lift gate until a time after which the accident was unavoidable. The crew failed to monitor the lift of the barge train constantly in light of the critical clearances between the flotilla and the chamber walls during the progress of the lift and during the anticipated severe surges associated with the introduction of water into the chamber to accomplish the hydraulics of the lift. Accordingly, the district court's decision that the government and Chotin were each 50% negligent in causing the collision here in issue and the trial court's determination that under maritime comparative negligence principles the government was liable to Chotin for 50% of the damage to Barge Chotin 3390 is AFFIRMED.

The same maritime comparative negligence principles do not, however, apply in allocating the parties' liability for the damage to the upstream lift gate. This court's attention is accordingly directed to the relevant sections of the Rivers and Harbors Act, 33 U.S.C. §§ 408 and 412, which allocated liability under circumstances analogous to those developed by the evidence in the case at bar. 33 U.S.C. §§ 408 and 412 provide, in pertinent part, that:

> It shall not be lawful for any person or persons to . . . alter, deface, destroy, move, injure, . . . *or in any manner whatever impair the usefulness* of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, *or other work* built by the United States . . . for the preservation and improvement of any of its navigable waters or to prevent floods. . . .

33 U.S.C. § 408 (emphasis added).

> And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft . . . and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof.

33 U.S.C. § 412.

In *Hines, Inc. v. United States*, 551 F.2d 717, 724 (6th Cir. 1977), a case factually parallel to the instant case, this Circuit unequivocally announced that "Section 408 imposes strict liability, as compared to § 409's requirement of negligence. Section 412 also provides that 'any boat, vessel . . . or other craft used or employed in violating any of the provisions of sections . . . 408 . . . of this title shall be liable for . . . the amount of the damages done by said boat, vessel . . . or other craft. . . .'" *See also United States v. Tug Colette Malloy*, 507 F.2d 1019 (5th Cir. 1975).

Hines, Inc. thereupon proceeded to adopt favorably the Seventh Circuit's rationale enunciated in *United States v. Ohio Valley Co.*, 510 F.2d 1184 (7th Cir. 1975):

> [T]he purpose of the combined effect of sections 14 and 16 [33 U.S.C. §§ 408 and 411] is to provide

> funds for the replacement and maintenance of improvements built by the United States. This purpose is implemented through an absolute liability standard. Thus, it would be wholly inconsistent to apply the limitation of liability provisions of section 183 (a) to the absolute liability provisions of section 14, while at the same time not applying them to section 15 (wreck statute) [33 U.S.C. § 409] which speaks in terms of "voluntarily or carelessly" allowing a vessel to sink. Furthermore, section 183(a) speaks in terms of lack of "privity and knowledge." That phrase implies that the owner be unaware of the fault in his vessel that caused an accident. Since the triggering mechanism for section 183(a) limitation of liability is tied to an awarenes of negligence, and because negligence is not significant in actions under sections 14 and 16, it follows that the limitation of liability provisions are inapplicable to those sections.

Id. at 1188 (footnote omitted).

The pronouncements of the Seventh Circuit in *United States v. Ohio Valley Co.* and the Sixth Circuit's resolution of *Hines, Inc. v. United States* were echoed by the Eighth Circuit in *United States v. Federal Barge Lines, Inc.*, 573 F.2d 993 (8th Cir. 1978), wherein that court further analyzed the purpose of the Rivers and Harbors Act, 33 U.S.C. §§ 408 and 412:

> The purpose of the Act is to protect, preserve, and make safe the Nation's navigable waterways, and the United States is the principal beneficiary of the Act. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 201, 88 S.Ct. 379 [385], 19 L.Ed.2d 407 (1967). The Act should be construed broadly to effectuate its goals. *Wyandotte Transportation Co. v. United States, supra; United States v. Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960). Congress imposed strict liability under

> sections 408 and 412 in order to provide funds for the replacement and maintenance of improvements made by the United States; to interpret those sections in such a way as to limit liability would be inconsistent with the intention of Congress.

573 F.2d at 997. *See also United States v. Logan & Craig Charter Service, Inc.*, 676 F.2d 1216 (8th Cir. 1982)

As early as 1906, the First Circuit laid to rest challenges to the Rivers and Harbors Act in *New England Dredging Co. v. United States*, 144 F. 932, 933 (1st Cir. 1906), wherein it elaborated on the purposes, underlying the congressional promulgation when it explained:

> If the view of the United States is upheld, it is by virtue of the modern body of law, existing in this country, as well as in England, which is founded upon the arbitrary but necessary police power inherent in government, rather than upon general principles which govern in other cases.
>
> This exceptional rule, founded largely upon statutes enacted for the enforcement of the plenary power in government is recognized as applying to . . . a variety of conditions relating to the public health and public good.
>
> As to wrongs within this rule, the penalty is supposed to attach to the offending act without regard to the question of willfulness or intent, and without regard to the question of mistake or innocence. The rule is, of course, in derogation of the principles of the common law, and its drastic quality is justified upon grounds of necessity, and as in the interest of the public good.
>
> The expressed object of resorting to the exercise of plenary power through arbitrary and exceptional remedies in such matters, is to better safeguard the public good in situations where the public good is

> easily subject to imposition and injury through heedless, inadvertent, or indifferent violations of laws enacted for the general welfare. . . .

Thus, because strict liability under 33 U.S.C. §§ 408 and 412 of the Rivers and Harbors Act arises from a violation of the above statutes and not from common law tort negligence, and because the trial court properly assessed 50% of the liability proximately contributing to the damage of the upstream lift gate of the Wilson Lock on the Tennessee River against Chotin, it must, pursuant to the mandate of the statutory language, reimburse the government for the entire cost of the damage to the described lift gate.[4]

The Supreme Court's decision in *United States v. Reliable Transfer, Inc.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed. 2d 251 (1975), does not mandate a different result. First, this Circuit found no conflict with its pronouncement that "[s]ection 408 imposes strict liability," *Hines*, 551 F.2d at 724, and the mandate of *Reliable Transfer*, which had been decided two years earlier. Second, the Court in *Reliable Transfer* did not apply comparative negligence

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[4] This decision does not suggest, as implied by the dissent, that the owner of a vessel involved in damaging a navigable water improvement must reimburse the government for the damage under circumstances where the government was 100% at fault. Two circuits which addressed that issue have concluded that the offending vessels may escape liability by showing that the government was 100% at fault. *See Tug Colette Malloy*, 507 F.2d at 1022; *United States v. Central Soya, Inc.*, 697 F.2d 165, 169 n.4 (7th Cir. 1982). That controversy is not joined by the facts of this appeal since the district court assessed 50% of the liability proximately contributing to the damage of the upstream life gate of the Wilson Lock to both Chotin and the government. Accordingly, this en banc court does not consider or decide the degree of negligence, if any at all, that must be attributable to "any person or persons [who] . . . alter, deface, destroy, move, injure, . . . or in any manner whatever impair the usefulness of . . ." any improvement made by the United States to any of its navigable waters in violation of §§ 408 and 412 before invoking the strict liability of these sections.

principles in abrogation of a statute which imposed strict liability. Instead, the Court held

> that when two or more parties have contributed by their fault to cause property damage *in a maritime collision or stranding*, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault. . . .

421 U.S. at 411, S.Ct. at 1716 (emphasis added). Maritime cases involving collisions at sea and strandings are governed by common law rules of admiralty which the Supreme Court was free to modify. As the Court stated in *Reliable Transfer*, " '[C]ongress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.' No statutory or judicial precept precludes a change in the rule of divided damages. . . ." 421 U.S. at 409 (citations omitted). In contrast, the instant case involves neither a "collision" nor a "stranding" as those terms are used in admiralty law. Rather, this case is controlled by the Rivers and Harbors Act which imposes strict liability in allocating damages against a private party who violates the pertinent sections of the Act. Therefore, the *Reliable Transfer* decision is not applicable to the instant case.

Congress has made the government the principal if not the sole beneficiary of the Rivers and Harbors Act by assessing vessels, persons, or corporations with the entire amount of the damage to navigable improvements owned or controlled by the government which damage was proximately caused by their acts. This court cannot, as suggested by the dissent, ignore the Congressional mandate.[5]

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[5] The Achilles' heel of the dissent is its failure to distinguish the term "strict liability" as it has evolved in products liability actions from the term as used in construing §§ 408 and 412 of the Rivers and Harbors Act.

Although the legal doctrine of strict liability in a products liability case does not impose absolute liability, it is generally

Accordingly the district court's determination that Chotin was strictly liable to the United States for damages to Wilson Lock's upstream gate is AFFIRMED.

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characterized as liability without fault because there is no burden placed upon the plaintiff to prove negligence to impose liability since negligence is not an issue. The issue in a strict liability products case is not the *degree of care* exercised in the design and/or manufacture of the product but, rather, whether the product, when placed into the stream of commerce, was reasonably safe for its intended use in its intended environment as impliedly warranted by the manufacturer. Conversely, in the case at bar, this court is not confronted with a cause of action which arises pursuant to the doctrine of strict liability which has evolved in products liability actions from principles of common law tort, but rather with liability imposed from a violation of a statutory enactment by Congress as memorialized in §§ 408 and 412 of the Rivers and Harbors Act. Every circuit that has interpreted §§ 408 and 412 of the Act, including this Circuit, has determined that it was the congressional intent *not to limit the liability* of a vessel and/or owner for damage to a navigable improvement to any amount less than the total amount of the damage that resulted from the incident.

A cursory examination of the cases relied upon by the dissent discloses that they do not provide support for its arguments or conclusions. In *United States v. Central Soya, Inc.*, 697 F.2d 165, 169 n.4 (7th Cir. 1982), the primary issue was the applicability of the three-year statute of limitations, 28 U.S.C. § 2415(b), to actions initiated by the government pursuant to the Rivers and Harbors Act. The decision in that case simply concluded that such actions were founded in tort and thus a three-year tort statute of limitations applied. Worthy of note in the court's opinion is the language which interpreted § 408:

> In all actions brought pursuant to this statute, a defendant-vessel is liable if it is shown that the vessel has been the cause of the violation of § 408. There is no requirement that negligence be shown as the statute has been interpreted to be one of strict liability.

Id. at 168 (emphasis added) (citations omitted). The case did not address the application of comparative fault principles to actions initiated pursuant to the Rivers and Harbors Act.

Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129 (9th Cir. 1977), was a strict liability action wherein the

For the reasons stated herein, the judgment of the district court awarding the United States $136,374.51 in

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plaintiff sought to recover damages for injuries allegedly caused by a defectively designed and/or manufactured oil filter which purportedly caused a fire in the engine room of a vessel. The plaintiff included in its complaint a claim for a breach of implied warranty charging that the oil filter was not free from defect and consequently not reasonably fit and/or safe for its intended use within the environment of its intended use, which pleading was typical of a stereotype strict liability products action. The court applied the comparative fault doctrine to the strict liability claim noting that "we have [no] . . . statute or other state law to interpret and apply." *Id.* at 1138 n. 5. Obviously, the Rivers and Harbors Act was not involved in the action. Similarly, *Lewis v. Timco, Inc.*, 716 F.2d 1425 (5th Cir. 1983) (en banc), was a products liability case involving injuries which purportedly resulted from defectively designed and/or manufactured hydraulic tongs used on an off-shore oil rig wherein the Fifth Circuit Court of Appeals unequivocally announced that "[i]n maritime tort cases courts traditionally apply principles of maritime law, as informed by common law tort developments, *unless a policy determination has been made by the Congress.*" *Id.* at 1427 (emphasis added) (citations omitted). Again, the Rivers and Harbors Act was not involved. In *Murray* v. *Fairbanks Morse*, 610 F.2d 149 (3d Cir. 1979), a nonmaritime case, the Third Circuit applied the Virgin Islands comparative fault statute, 5 V.I.C. § 1451, in determining that the doctrine applied in strict liability products actions. Thus, that court was confronted with a legislative mandate completely opposite to the mandate which this court must address.

The court in *Theriot v. J. Ray McDermott & Co.*, 742 F.2d 877 (5th Cir. 1984), merely held that "a Jones Act [46 U.S.C. § 688] defendant must bear the responsibility for his negligence if such negligence played any part, *even the slightest*, in producing the injury . . . ." *Id.* at 881 (emphasis in original) (citations omitted). Neither the Rivers and Harbors Act nor any section thereof was at issue in that matter. Furthermore, cases which apply comparative fault principles under the Jones Act cannot be considered analogous to the case at bar. The Jones Act, 46 U.S.C. § 688, imposes comparative fault principles by congressional enactment in the following express terms:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, . . . and in such action *all statutes of the United*

damages plus prejudgment interest is hereby AFFIRMED.

States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . .

Id. (emphasis added). Section 3 of the Federal Employers' Liability Act, 45 U.S.C. § 53, modifies the common law in cases of personal injury to railroad employees, *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943), and provides, in part:

> In all actions . . . brought against [a] . . . common carrier by railroad . . . to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but *the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee* . . . .

(emphasis added). The Jones Act is not remedy analogous to the Rivers and Harbors Act. They are two separate, distinct, and unrelated statutory enactments. Thus, the application of comparative fault principles in Jones Act cases, *as mandated by Congress, Roy Crook and Sons, Inc. v. Allen*, 778 F.2d 1037, 1040 (5th Cir. 1985), is hardly surprising. The case at bar, however, confronts this court with a contrary congressional mandate, i.e., the imposition of strict liability against vessels used or employed in damaging the United States' navigable improvements pursuant to a specific direction of Congress.

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953); and *Hlodan v. Ohio Barge Line, Inc.*, 611 F.2d 71 (5th Cir. 1980), included "general claim[s] of negligence and unseaworthiness," *Hlodan*, 611 F.2d at 73, under "general maritime law" brought by private individuals against vessel owners for personal injuries. The government was not a party, and neither the Rivers and Harbors Act nor any section thereof was at issue in those cases. Here again, the "general maritime law" claims in those cases were not controlled by congressional enactments even remotely similar to the Rivers and Harbors Act.

MILBURN, Circuit Judge, concurring in part and dissenting in part. I concur with the majority in affirming the district court with regard to its holding as to the damages suffered to Chotin's barge No. 3390. However, I respectfully dissent as to the majority's holding in favor of the government on its claim against Chotin for the damages done to the upstream miter gate at the Wilson Dam lock. I dissent because I believe that section 16 of the Rivers and Harbors Appropriate Act of 1899 ("the act"), 33 U.S.C. § 412 ("section 412"), which renders private parties strictly liable for any injury caused to government-constructed river and harbor improvements, permits application of comparative fault where the government's own negligence contributes to its injury.

The starting point in interpreting a statute is the language itself. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Donovan v. Southern California Gas Co.*, 715 F.2d 1405, 1407 (9th Cir. 1983) (per curiam); *Securities and Exchange Commission v. Ambassador Church Finance/Development Group, Inc.*, 679 F.2d 608, 611 (6th Cir. 1982); *United States Lines, Inc. v. Baldridge*, 677 F.2d 940, 944 (D.C. Cir. 1982). Section 14 of the Act, 33 U.S.C. § 408 ("section 408"), provides that it is unlawful to "alter, deface, destroy, move, injure . . . or . . . impair the usefulness of any . . . work built by the United States . . . for the preservation and improvement of any of its navigable waters . . . ." Section 412 provides that "any boat, vessel, scow, raft, or other craft used or employed in violating . . . section[] . . . 408 . . . shall be liable . . . for the amount of the damages done by said boat, vessel, scow, raft, or other craft. . . ."

The literal language of section 412 makes clear that private parties are strictly liable for any damage caused by their violation of section 408. *See United States v. Central Soya, Inc.*, 697 F.2d 165, 169 n.4 (7th Cir. 1982); *United States v. Logan & Craig Charter Service*, 676 F.2d

1216, 1219 (8th Cir. 1982); *United States v. Federal Barge Lines, Inc.*, 573 F.2d 993, 997 (8th Cir. 1978); *Hines, Inc. v. United States*, 551 F.2d 717, 724 (6th Cir. 1977); *United States v. Ohio Valley Co.*, 510 F.2d 1184, 1186 (7th Cir. 1975); *United States v. Tug Colette Malloy*, 507 F.2d 1019, 1022 (5th Cir. 1975); *United States v. M/V Martin*, 313 F.2d 851, 853 (7th Cir. 1973). Strict liability "means liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence." W. Prosser & W. Keeton, *The Law of Torts* § 75, at 534 (5th ed. 1984); *see also Birchfield v. International Harvester Co.*, 726 F.2d 1131, 1135 (6th Cir. 1984) (strict liability, by definition, is unconcerned with the negligence or other culpable behavior of the defendant); *Kehm v. Procter & Gamble Manufacturing Co.*, 724 F.2d 613, 620 (8th Cir. 1983) (under strict liability regime, the defendant can be held liable even though he was not negligent). *Smith v. First-Roosevelt Motors, Inc.*, 556 F.2d 728, 730 (5th Cir. 1977) (strict liability removes the burden of proving that the defendant was negligent).

The majority, however, rejects this well-settled definition of strict liability, holding that section 412 imposes strict liability but declining to decide whether liability under section 412 requires proof of negligence. The majority's inexplicable definition of strict liability finds no support in the decisions interpreting section 412, which have, without exception, defined strict liability as simply relieving the government of the burden of showing negligence. *See Central Soya*, 697 F.2d at 168 ("There is no requirement that negligence be shown as the statute has been interpreted to be one of strict liability."); *Logan & Craig Charter Service*, 676 F.2d at 1220 (sections 408 and 412 impose strict liability and require no showing of negligence); *Hines*, 551 F.2d at 724 (Section 408 imposes strict liability, as compared to § 409's requirement of

negligence."); *Ohio Valley Co.*, 510 F.2d at 1186 (sections 408 and 412 do not require proof of negligence); *M/V Martin*, 313 F.2d at 852-54 (liability under section 408 is not predicated upon negligence); *New England Dredging Co. v. United States*, 144 F. 932, 933 (1st Cir. 1906) (liability under section 408 is imposed "without regard to the question of willfulness or intent, and without regard to the question of mistake or innocence"); *United States v. The Republic No. 2*, 64 F. Supp. 373, 377 (S.D. Tex. 1946) (liability imposed under section 408 even though there was no negligence shown); *The Gansfijord*, 25 F.2d 736, 737 (E.D. La. 1928) (liability under section 408 does not require proof of negligence), *aff'd, Aktieselskabet Dampshib Gansfjord v. United States*, 32 F.2d 236 (5th Cir.), *cert. denied*, 280 U.S. 578 (1929).

While the language of section 412 imposes strict liability for violations of section 408, the mere imposition of strict liability, as defined by the decisions interpreting section 412, does not preclude application of comparative fault where the government's own negligence contributes to its injury. "[W]hile section 412 is a statute of strict liability, it is not one of absolute liability. . . . [A]n offending vessel may escape fault if it can prove that the collision resulted from the fault of the Government, which is a typical defense in tort." *Central Soya*, 697 F.2d at 169 n.4; *see also Tug Colette Malloy*, 507 F.2d at 1022 (court reasoned that if the defendant had shown that the government was at fault in causing the accident a defense would have been established); *United States v. P/B STCO 213*, 569 F. Supp. 743, 744 (S.D. Tex. 1983) (court noted that section 412 imposes strict liability but not absolute liability), *rev'd on other grounds*, 756 F.2d 364 (5th Cir. 1985); *Rebel Towing Co. v. United States*, No. 64-H-67, slip op. at 13 (S.D. Tex., March 3, 1965) (court refused to permit government to recover where the government was at fault in causing the accident).

Where the language of a statute is not dispositive, a court must interpret the statute in accordance with the objective the legislature sought to achieve. *See Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). The objective to be achieved by section 412's imposition of strict liability is to insure that the full costs of injuries caused by private parties to river and harbor improvements are borne by private parties and not the government. In *Federal Barge Lines*, the court explained:

> The purpose of the Act is to protect, preserve, and make safe the Nation's navigable waterways, and the United States is the principal beneficiary of the Act. . . . Congress imposed strict liability under sections 408 and 412 in order to provide funds for the replacement and maintenance of improvements made by the United States . . . .

573 F.2d at 997 (citations omitted); *see also Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 201 (1967); *Logan & Craig Charter Service*, 676 F.2d at 1219.

Application of comparative fault does not impede achievement of this objective nor erode the government's strict liability remedy. Comparative fault focuses attention on damages, not liability, and allocates damages between the parties who are responsible for the injury. W. Prosser and W. Keeton, *supra*, § 67, at 470. The objective of section 412 remains intact when comparative fault is applied because private parties remain strictly liable for any injury caused by their conduct except that the award of damages will be reduced in proportion to the government's causal contribution to its injury.[1] *Cf. Timco*, 716 F.2d at 1430 (court reasoned

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[1] Perhaps comparative causation is a conceptually more precise term than comparative fault "since fault alone without causation

that policy reasons underlying strict products liability are not undermined by application of comparative fault since manufacturer is still strictly liable for all the harm caused by a defective product, except that caused by the consumer's own conduct); *Pan-Alaska Fisheries*, 565 F.2d at 1139 ("It comes down to this: the defendant is strictly liable for the harm caused from his defective product, except that the award of damages shall be reduced in proportion to the plaintiff's contribution to his own loss or injury.").

Absent contrary legislative intent, "federal courts interpret federal statutes as consistent with existing law, of which common law principles are a part." *Tarlton v. Saxbe*, 507 F.2d 1116, 1122 n.14 (D.C. Cir. 1974); *see also United States v. Locke*, 471 U.S. 84, 105 S. Ct. 1785, 1794-95 (1985); *United States v. Monasterski*, 567 F.2d 677, 682 (6th Cir. 1977). Because the government's action arises out of what is essentially a maritime tort, the law of maritime torts is particularly analogous to this case. In *Central Soya*, the court explained:

> Here . . . we are confronted with an action seeking monetary damages arising from a wrongful act, which, according to the definition provided by Congress, is an action founded upon a tort. That the Rivers and Harbors Act was enacted pursuant to the Commerce Clause does not alter the fact that the

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does not subject one to liability." *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129, 1139 (9th Cir. 1977); *see also Lewis v. Timco, Inc.*, 716 F.2d 1425, 1431 (5th Cir. 1983) ("It is inevitable that a comparison of the conduct of plaintiffs and defendants ultimately be in terms of causation."); *Murray v. Fairbanks Morse*, 610 F.2d 149, 150-60 (3d Cir. 1979) ("the comparison itself must focus on the role each played in bringing about the particular injury."). But whether we use the term comparative fault or comparative causation, "we are merely beating around the semantical bush seeking to achieve an equitable method of allocating the responsibility for an injury or loss." *Pan-Alaska Fishers*, 565 F.2d at 1139.

> Government's case essentially concerns a maritime tort—a suit for damages arising from the collision of a barge with a lock and dam—for which it now seeks money damages.
>
> * * * *
>
> That the Government's action for damages in this case is founded in "tort" is further exemplified by the fact that two of the basic policies underlying theories of tort liability are satisfied by the Government's suit: deterrence of harm-causing conduct and compensation for damages and injuries arising out of that conduct. . . .

697 F.2d at 169 & n.4 (citation omitted); *see also P/S STCO 213*, 569 F. Supp. at 744 (court noted that section 412 concerns the government's recovery of damages for a maritime tort).

Comparative fault is the admiralty rule in maritime collision and personal injury cases. Admiralty courts followed the equal division of damages rule in collision cases until 1975 when the Supreme Court overruled its prior decisions and adopted "pure" comparative fault. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975). Finding that comparative fault is a more efficacious means of achieving a "just and equitable" apportionment of damages, the Court held that

> [W]hen two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.

Id. Comparative fault is also applicable in personal injury actions under the Jones Act, 46 U.S.C. § 688, *see*

Theriot v. J. Ray McDermott & Co., 742 F.2d 877, 881 (5th Cir. 1984), in actions for unseaworthiness under general maritime law, *see Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-09 (1953); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939); *Hlodan v. Ohio Barge Line, Inc.*, 611 F.2d 71, 74 (5th Cir. 1980), and in strict products liability actions under general maritime law, *see Timco*, 716 F.2d at 1433; *Pan-Alaska Fisheries*, 565 F.2d at 1139; *Schaeffer v. Michigan-Ohio Navigation Co.*, 416 F.2d 217, 221 (6th Cir. 1969).

Admiralty courts have encountered little difficulty in reconciling comparative fault and strict liability. Although unseaworthiness is "a species of liabiilty without fault," *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 (1946), a seaman's damages are always reduced in proportion to his contributory fault. *See Socony-Vacuum*, 305 U.S. at 429; *Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1088 n.4 (4th Cir.), *cert. denied*, —— U.S. ——, 106 S. Ct. 136 (1985); *Fontenot v. Teledyne Movible Offshore, Inc*, 714 F.2d 17, 19 (5th Cir. 1983); *Hlodan*, 611 F.2d at 74. The same was true of longshoremen until their action for unseaworthiness was abolished. *See Pope & Talbot*, 346 U.S. at 409. Further, admiralty courts have uniformly applied comparative fault in maritime strict products liability cases. *Timco*, 716 F.2d at 1433; *Pan-Alaska Fisheries*, 565 F.2d at 1138-39; *Schaeffer*, 416 F.2d at 222.

The general principles of tort law developed outside of admiralty may also be relied upon in determining whether comparative fault is applicable in actions brought pursuant to section 412. *See Tug Colette Malloy*, 507 F.2d at 1022 & n.1 (court looked to general principles of tort law to determine whether "garden-variety" contributory negligence is a defense in an action brought pursuant to section 412). Outside of admiralty, courts and commentators have, with few exceptions, favored application of comparative fault in strict liability actions. *See, e.g., Austin*

v. Raybestos-Manhattan, Inc., 471 A.2d 280 (Me. 1984); *Kaneko v. Hilo Coast Processing*, 65 Haw. 447, 654 P.2d 343 (1982); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 144 Cal. Rpetr. 380, 575 P.2d 1162 (1978); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976); V. Schwartz, *Comparative Negligence* 195-209 (1974 & Supp. 1981); Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 850 (1973). Moreover, the Uniform Comparative Fault Act § 1 (1977) expressly provides for application of comparative fault in actions based upon strict or absolute liability.

Interpretations of a statute which produce inequitable and unreasonable results should be avoided when alternative interpretations consistent with the statute's language and objective are available. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982); *Payne v. Panama Canal Co.*, 607 F.2d 155, 164 (5th Cir. 1979); *Virgin Islands v. Berry*, 604 F.2d 221, 225 (3d Cir. 1979). The majority's interpretation of section 412 renders a private party liable for 100 percent of the damages sustained by the government even where the government is 100 percent at fault. Although the majority denies that it is suggesting that a vessel involved in damaging a river or harbor improvement must reimburse the government for the full amount of damages where the government was 100 percent at fault, the government conceded at oral argument that the interpretation of section 412 adopted by the majority would permit no other result.[2] In *Tug Colette Malloy*, the court expressly

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[2] The majority suggests that this result may be avoided by interpreting section 412 as requiring a showing of negligence, in some degree, in order to impose liability. This suggestion flies in the face of the very decisions upon which the majority rests its conclusion that section 412 does not permit application of comparative fault.

rejected this inequitable result, stating that "we have no doubt that if the tug had shown the gateman to be solely at fault in causing the accident a defense would have been established." 507 F.2d at 1022; *see also Central Soya*, 697 F.2d at 169.

The unreasonableness of the majority's interpretation of section 412 is demonstrated by the fact that it encourages negligence by permitting the government to shift the costs of its negligence to non-negligent vessel owners in the form of damage awards against the owners of vessels involved in accidents and in the form of higher insurance premiums for other vessels that utilize river and harbor improvements. *Cf. Jones v. T.G. & Y. Stores Co.*, 775 F.2d 663, 665 (5th Cir. 1985) (court reasoned that rejection of comparative fault would pervert and distort economic incentives and expenditures by allowing full recovery to a plaintiff who was 90 percent at fault); *Timco*, 716 F.2d at 1432 (court reasoned that rejection of comparative fault in strict products liability cases would relieve the user of any incentive to avoid accidents). The majority's interpretation accomplishes "the result, extraordinary in our jurisprudence, of a wrongdoer shifting the consequences of his negligence onto his victim." *Wyandotte Transportation*, 389 U.S. at 204.

I do not suggest that this court may ignore the mandate of Congress whenever it finds a particular result unpalatable. It is simply my view that neither the language nor the objective of section 412 supports, let alone compels, the inequitable and unreasonable result reached by the majority in this case. Therefore, I would reverse the district court's allocation of damages to the lock and remand to the district court with instructions to assess fifty percent of the damages to the United States and fifty percent to Chotin.

EDWARDS, Senior Circuit Judge, concurring with Judge Milburn's dissent. The United States, because of its agent's negligence, should be held liable for one-half of the damage to the lockgate which the Chotin barge train hit.

I feel that Justice Stewart's unanimous opinion for the Supreme Court in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), was and is correct, and that it requires the result reached by Judge Milburn's opinion, in which opinion I join.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Docket No. 82-3342

CHOTIN TRANSPORTATION, INC.,
Plaintiff

vs.

UNITED STATES OF AMERICA,
Defendant, Counter-Claimant and Third-Party Plaintiff

vs.

M/V FRANCIS R. KEEGAN, Her Engines, Tackle, Appurtenances, Etc. In Rem: Barge Chotin 3390, Her Appurtenances, Tackle, Engines, Etc., In Rem: and Barge Chotin 1794, Her Appurtenances, Tackle, Engines, Etc., In Rem: and Chotin Transportation, Inc.,
Counter-Defendant Third-Party Defendants

MEMORANDUM

Chotin Transportation, Inc. (Chotin) filed this action against the United States (Government) on April 5, 1982 seeking recovery for damage to Barge Chotin 3390. The barge was part of a flotilla that also included the tug "M/V Francis R. Keegan" and Barge Chotin 1794. Barge Chotin 3390 sustained damage when the flotilla collided with the upriver gate of Wilson Lock on January 20, 1982. Wilson Lock, located on the Tennessee River, is the property of the United States government and is operated by the U.S. Army Corps of Engineers, an instrumentality

of the United States government. Wilson Lock is in the Nashville District of the Corps of Engineers. Chotin sues the United States under the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1920) (Admiralty Act), alleging that the Government's negligent operation of Wilson Lock caused damage to Chotin Barge 3390.

The United States has counter claimed against Chotin *in personam* for damages to Wilson Lock. The United States has also brought a third-party complaint *in rem* against the M/V Frances R. Keegan, Barge Chotin 1794 and Barge Chotin 3390. The *in personam* action is brought on a negligence theory. The *in rem* action is brought pursuant to the Rivers and Harbors Act, 33 U.S.C. §§ 408 and 412. The Government also seeks a penalty pursuant to 33 U.S.C. § 411 (1899). An appropriate letter of undertaking was filed by Chotin as a substitute for the *in rem* seizure of the M/V Francis R. Keegan, Barge Chotin 3390 and Barge Chotin 1794. This Court has jurisdiction pursuant to 28 U.S.C. § 1333. Venue is appropriate in this district. The subject matter jurisdiction and venue of this Court is not disputed by the parties. The parties have stipulated to the amounts of their respective damages in the event liability is found. A non-jury trial was held from May 31, 1983 to June 2, 1983. By agreement, the Government's *in personam* negligence claim was dismissed with prejudice on Chotin's motion at the close of the Government's case.[1]

I.

The basic facts are not in dispute. On January 20, 1982, the flotilla comprised of the tug M/V Francis R.

[1] The Government conceded it presented no proof to allow it to recover on an affirmative negligence claim. The dismissal of this claim does not preclude the Government from defending Chotin's claim under the Suits in Admiralty Act on a contributory negligence theory. Neither does the dismissal prevent the Government from recovering for damages to its lock under 33 U.S.C. §§ 408, and 412.

Keegan ["the Keegan" or "the tug"], Barge Chotin 1794 and Barge Chotin 3390 was proceeding upstream [2] on the Tennessee River towards Wilson Lock.[3] Barge Chotin 3390 was the lead barge followed by Barge 1794 and the tug. The Keegan and its tow came to the "point of arrival" for Wilson Lock sometime during the evening of January 20. The night was foggy and rainy.

Captain Paul Horton, the pilot of the tug, radioed Ivan Wallace, the only lock operator on duty that night, for permission to enter the lock. Horton told Wallace the size of the flotilla. Once Wallace determined that the flotilla could fit into the lock, he opened the lock's downriver "miter" gates, and authorized the Keegan and tow to enter the lock chamber by sounding the horn and changing the lock's signal light from amber to green. The flotilla was 586 feet six inches long and the chamber was 600 feet long.

The "miter" gates open into the lock chamber and recess into the lock walls when fully open. Horton maneuvered the flotilla into the lock successfully and placed the flotilla along the chamber's river wall, which was on the starboard side of the Keegan and her tow. Wallace, standing in the lock's lower land wall control station, directed Horton to move the flotilla to the land wall, on the port side of the flotilla. Horton did so. At the time the tug and tow stopped in the lock chamber, the tug's first mate, Donald Stewart, and a deckhand, Kevin Russell, were at the head of the tow, and deckhands Gaston and Welborn were at the stern of Barge Chotin 3390. The flotilla was brought to a stop four to five feet from the upper miter gate.

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[2] The river actually flows north-south at this point. "Downriver" or 'downstream" as used in this opinion means north; "upriver" or "upstream" means south.

[3] For a diagram of the lock and barges, see Appendix I.

Once the flotilla was positioned in the lock chamber, the tug's crew began to secure the flotilla to the land wall. To secure the flotilla, lines were connected from floating mooring bitts on the lock wall to deck fittings on the flotilla. A floating mooring bitt is a device that is attached to a floating cylindrical tank in the lock wall; it permits the vessel's lines to rise and fall with the water level in the chamber.

The proof revealed that it is customary to secure a flotilla in a lock chamber by only two lines. One line is a towing line, which prevents forward movement, and the other is a backing line, which prevents backward movement. Normally, a towing line is tied at the head of the tow. However, Paul Horton explained at trial that it does not matter if the position of the lines is reversed as long as the flotilla is secured by both a towing and a backing line.

In this case, the lead on the towing line was too long and the crew had to change it to a backing line. Captain Horton then reversed the Keegan's engines to remove slack from the backing line. Kevin Russell went to the stern of Barge Chotin 3390 to change the backing line to a towing line while Gaston and Welborn watched. Thus, there was a backing line on the bow and a towing line on the stern. Stewart then reported to Horton that the lines were secure. Horton returned the Keegan's throttles to neutral, thereby equalizing the stress on the two lines. Horton then reported to Wallace, the lock operator, that the flotilla was tied off on the land wall.

In an upstream lockage, the lockmaster is about 90-100 feet above the flotilla when the lines are tied. Wallace was observing the tying-off process from the lower land wall control station. He could see the stern of the Keegan. When he was satisfied that the flotilla was tied far enough forward to allow the downstream miter gates to close, he closed the gates. Captain Horton testified that after the downstream gates were closed, the tug and tow

could have been moved astern to allow more room between the head of the flotilla and the upstream lift gate, but this was not done.

Once the downstream gates were closed, the fog became denser and visibility was worsened. Wallace stated in his deposition that he could not see the flotilla's mooring lines nor could he see the distance between the head of the tow and the upriver gate. Wallace turned on the lock's filling valve from the lower land wall control station. He then walked along the land wall and attempted to check the mooring lines, but was unable to see them. He could not see members of the Keegan's crew who were on the port side of the Barge Chotin 3390. Next, Wallace got on his motor scooter and headed toward the upriver control station. He made a stop at the lock's main operations building, located between the downriver and the upriver control stations. There he picked up a newspaper to be delivered to the Keegan's crew. Wallace then proceeded next to the lock's second mooring bitt which was situated approximately one hundred twenty-six feet downriver from the upper gate. Wallace tried to examine the mooring lines, but could not do so. Wallace continued on to the first mooring bitt located fifty-four feet downriver from the upriver gate sill. Once again he was unable to see the mooring lines or the head of the tow. At this point Wallace decided to stop the flow of water into the lock chamber. To accomplish this, Wallace went into the upper land wall control station, where there was another set of valves controlling water flow. Wallace, however, was unable to get into the upper control station because his key would not work.

While Wallace was travelling from the lower land wall control station to the upper control station, Horton and his crew were experiencing surging.[4] A certain amount of surging is expected during the locking procedure.

[4] Surging means that the tug and tow are moving upriver and downriver in the chamber.

Moreover, some surging may occur even when the flotilla is tied properly.

In this instant case there were two episodes of surging. The first episode occurred when the water began to enter the lock chamber. During the first episode of surging, deckhand Greg Gaston noticed some slack in the towing line. Gaston removed the towing line from Barge Chotin 3390's deck fittings and retied the line to eliminate the slack. Captain Horton testified that he thought the first episode of surging was more severe than at other locks. He engaged the starboard engine astern to "hold it back." The surging stopped and the water level continued to rise in the chamber.

After the first episode of surging had stopped, first mate Stewart walked forward from his station to the bow of Barge Chotin 3390 to check the distance between the bow of the barge and the upriver gate. He thought at that time that the bow of Barge Chotin 3390 was not in danger of hitting the lift gate. Stewart did not check the towing line at that time. A second episode of surging occurred about eight minutes later. This second episode lasted for approximately six to eight minutes and was caused by the filling valves automatically increasing their openings from five feet to fifteen feet, as described in Ivan Wallace's deposition. The captain did not call the lock operator to inform him of either episode of surging, but waited for the lock operator to notify him if something was amiss.

When the tow rose to a few feet below the gate, Stewart saw the reflection of the tow's amber running light on the gate and he realized that the bow of the lead barge was close to the gate. Stewart sent deckhand Kevin Russell to the extreme forward edge of the tow to determine the clearance. Russell went to the head of the tow and reported that impact was imminent. Stewart called Captain Horton on the radio and told him that he thought they were too far forward to safely

clear the upstream lift gate. The Captain engaged the engine astern to back the flotilla away from the upper gate. Horton then called for Wallace, the lock operator, to shut off the water. By then, it was too late to avoid impact. The bow of Barge Chotin 3390 struck the up-river lift gate. The water continued to rise. The stern of Barge Chotin 3390 and the rest of the flotilla rose with the water level in the chamber. The bow of Barge 3390 became stuck under the gate and was unable to rise. These combined forces caused the coupling between Barge 3390 and Barge 1794 to break and the bow rake of Barge Chotin 3390 to disconnect.

II

A.

Chotin sues the United States Government under the Suits in Admiralty Act. The Admiralty Act, 46 U.S.C. §§ 741-752, "constitutes a waiver of sovereign immunity of the United States for certain maritime claims against the Federal Government," *Chute* v. *United States*, 449 F. Supp. 172, 180 (D.C. Mass. 1978), *rev'd on other grounds*, 610 F.2d 7 (1st Cir. 1979), and specifically provides that "[i]n cases where . . . if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate noninjury proceeding in personam may be brought against the United States. . . ." 46 U.S.C. § 742. The language, "if a private person or property were involved" was added in 1960 "to bring all admiralty claims against the United States within the ambit of 46 U.S.C. §§ 741, *et seq.*, . . . whether or not involving government cargoes or vessels." *Kelley* v. *United States*, 531 F.2d 1144, 1149 (2d Cir. 1976), *National Union Fire Ins. Co. of Pittsburgh* v. *United States*, 436 F.Supp. 1078, 1080 (M.D. Tenn. 1977). The "private person" language of the Act does not mean that a claim brought under the Act must fail because it is based on an act usually performed by the

Government. *Canadian Transport Co.* v. *United States*, 663 F.2d 1081, 1090 (D.C. Cir. 1980). Hence, the action here is properly brought under the Admiralty Act even though the damage to Chotin's Barge occurred through a collision with a lock gate and not with a government vessel. The Admiralty Act does not itself create a cause of action against the United States. *Trautman* v. *Buck Steber, Inc.*, 693 F.2d 440, 444 (5th Cir. 1982). "[T]he Act merely provides a jurisdictional hook upon which to hang a traditional admiralty claim." *Id.* Chotin must prove facts sufficient to establish negligence regardless of the Act. In order to recover under the Admiralty Act, the plaintiff must show that the defendant was guilty of a statutory violation or some act of negligence that contributed causally to the collision. *Toney* v. *U.S. Army Corps of Engineers*, 397 F.Supp. 307, 312 (M.D. La. 1975).

Chotin maintains that the case of *Indian River Towing Company* v. *United States*, 350 U.S. 61 (1955), describes the standard of care that was owed by the Government in the instant case. This Court disagrees that *Indian River* is on point with the facts of Chotin's case. *Indian River* dealt with the duty to maintain and operate "aids to maritime navigation." In *Indian River*, the Supreme Court reasoned that once the Government has voluntarily assumed certain functions, such as the establishment and operation of a lighthouse and other parties rely on this governmentally performed function, the Government has a continuing duty to maintain the navigational aid in good order. *Id.* at 69. In contrast, a lock is not an aid to navigation because any assistance it provides is merely an incident of its physical presence. 19 A.L.R. Fed. 297, 317-20 (1974). Here, the tug and barges successfully navigated into the lock; there can be no allegation that the failure of any Government-owned navigation device caused the collision. There is no charge that the lock tender erred in any way in aiding the tow and barge to navigate into the lock; thus the *Indian River* case is not

pertinent. *See also Alter Co.* v. *United States*, 412 F. Supp. 73, 79 (S.D. Iowa 1976) (the court used the *Indian River* decision to establish the level of care required of a lockmaster when aiding a vessel to navigate into a lock chamber).[5]

B.

In that the *Indian River* duty of care is not applicable in the instant case, it is necessary to look to the laws imposing duties on the United States Army Corps of Engineers with regard to government-owned locks. The Secretary of the Army has the authority to promulgate regulations concerning navigation on the waters involved in this case pursuant to 33 U.S.C. § 1.[6] As these regulations "have the force and effect of law," *Afran Transport Co.* v. *S/S Trans Colorado*, 321 F.Supp. 546, 551 (D.C.Z. 1971), *modified and remanded on other grounds*, 458 F.2d 164 (5th Cir. 1972), they create a duty on the Government.

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[5] *Indian River* is also not applicable to the instant case because Chotin was not justified in relying on any government-performed function; under 33 U.S.C. § 351. Section 351 provides in relevant part that:

> "nothing in these rules . . . shall exonerate any vessel, or the owner or master or crew thereof . . . of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstance of the case."

Thus, section 351 perforce requires rejection of Chotin's argument that *Indian River* establishes the requisite degree of care.

[6] That section provides, in part, as follows:

> It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department . . . .

Sections 207.300, *et seq.*, of Title 46 of the Code of Federal Regulations cover the operation and use of the Wilson Lock. Paragraph (a) of § 207.300 deals with the authority of lockmasters:

> The lockmasters shall be charged with the immediate control and management of the lock, and of the area set aside as the lock area, including the lock approach channels. He shall see that all laws, rules, and regulations for the use of the lock area are complied with, to which end he is authorized to give all necessary orders and directions in accordance therewith, both to employees of the Government and to any and every person within the units of the lock or lock area, whether navigating the lock or not. No one shall cause any movement of any vessel, boat or other floating thing in the lock or approaches except by or under the direction of the lockmaster.

46 C.F.R. § 207.300(a). Thus, the lockmaster has a duty to see that "laws, rules, and regulations" are complied with. There is a question as to which "laws, rules and regulations" this paragraph incorporates. It is obvious that this language includes federal statutes and the other subsections of 33 C.F.R. § 207.300. It is not clear whether *The Locking Procedures Safety Manual*[7] is a set of rules for the purposes of § 207.300. Chotin insists that this internal manual does set forth the appropriate standard of care owed by the Government. In any event, the Court need not decide expressly whether the *Locking Procedures Safety Manual* gives rise to any duty on the part of the Government because the Court is convinced that § 207.300 itself sets forth an appropriate standard.

Paragraph m(1)(i) of § 207.300 provides that "[a]ll vessels shall be moored as directed by the lockmaster." This imposes a duty on the lockmaster to supervise the

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[7] The Locking Procedures Safety Manual is given to lock operators but is not available to the public.

mooring of the vessel in the lock. In *Alter Co.* v. *United States*, 412 F.Supp. 73 (S.D. Iowa 1976), the court allocated this duty to the lockmaster when interpreting section 207.300 (m) (1) (i). The *Alter* Court considered it "incumbent upon lock operators to give those shore to river commands such as how to lock line should be worked, necessary to effectuate a successful lockage. . . " 412 F. Supp. at 81. In the instant case, Wallace, the lockmaster, did not supervise the tying of the backing and towing lines. In fact, Wallace stated in his deposition that he could not even see the mooring lines because of the fog. Therefore, Wallace breached the duty imposed under § 207.300(m) (1) (i) because he did not direct the mooring of the vessel in the lock.

Section 207.300(a) also charges the lockmaster with "immediate control and management of the lock." Clearly, Wallace had the ultimate authority to stop the locking procedure. If he felt the fog prevented a safe lockage, he had the responsibility to stop the flow. Wallace violated § 207.300 in several ways. Wallace did not supervise the mooring of the flotilla in the lock chamber. Wallace did not check the distance between the head of the flotilla and the upstream lift gate after Captain Horton informed him that the flotilla had been secured in the chamber. Wallace could not see the mooring lines. Nevertheless, Wallace who as lockmaster, possessed the ultimate authority to decide whether to proceed with the lockage, started the flow of water into the chamber. Wallace was unable to check the lines after the lockage began, although he made several attempts. He was the one in control of the lock, yet he failed to stop the flow of water until it was too late to prevent the disaster. These violations of § 207.300 were proximate causes of the accident. Therefore, Chotin is entitled to recover damages from the United States, based on the lockmaster's failure to carry out his duties under § 207.300.

C.

The next issue to be addressed is whether Chotin was contributorily negligent. If Chotin is found to have contributed to the collision, then liability for damage to its barge must be apportioned between the Government and Chotin. *Alter Co.* v. *United States*, 412 F. Supp. 73, 82 (S.D. Iowa 1976).

Section 351 of Title 33 U.S. Code, states that "nothing in these rules [i.e. regulation § 207.300 promulgated pursuant to 33 U.S.C. § 1] shall exonerate any vessel . . . from the consequences . . . of any neglect to keep a proper lookout." This Court finds that the tug's crew did not keep a proper lookout, either in checking the lines for any slack or in observing the distance between the bow of the lead barge and the lockgate If the crew had been properly checking the lines, it would have noticed slack in the line and thus would have realized that the two had moved forward. The defense that the crew was unable to see the line because of the fog and darkness is not persuasive. The crew of the tug was aware that the head of the flotilla was only a few feet from the upriver gate, yet no crew member was assigned to continuously monitor the distance from the head of Barge 3390 to the gate. First mate Stewart checked the clearance once, and sent deckhand Russell to check it just before impact. If proper lookout had been maintained, and a crew member had noticed the slack in the lines or that the head of the tow was too close to the upriver gate, it is foreseeable that the lock operator could have been notified in time to stop the flow of water into the chamber and avoid the accident.

Further, there was a lack of communication between the crew and the master of the tug. "If the lookout cannot, or does not, report his observations, improper watch is being maintained." *United States* v. *Tug Collette Malloy*, 507 F.2d 1019, 1023 (5th Cir. 1975), citing *Coyle Lines, Inc.* v. *United States*, 195 F.2d 737 (5th

Cir. 1952), and *Sun Oil Co.* v. *A/A Georgel*, 245 F.Supp. 537, 545 (S.D. N.Y. 1965), *aff'd*, 369 F.2d 406 (2d Cir. 1966). It follows that if the lookout was unable to see the lines or the distance between the head of the tow and the lockgate because of the fog, the lookout should have reported that fact to the master. Stewart was aware that the head of the tow was dangerously close to the gate yet instead of reporting this to the master or to the lockmaster, he sent Russell forward to check the clearance. Stewart testified at trial that there was no lookout with a radio posted on Barge Chotin 3390. Therefore, there was no means to quickly notify Captain Horton or Wallace, the lockmaster, in the event of an emergency.

The tug's crew was also negligent in failing to take "any precaution that may be required by the ordinary practice of seamen, or by the special circumstances of the case." 33 U.S.C. § 351. Section 351 also imposes this duty on a vessel regardless of the duties imposed on the government. Although the flotilla may have been moored properly at the start of the lockage, the crew should have known that surging was likely in the lock; therefore, the crew should have taken measures to ensure that the flotilla's lines remained secure during the surging. In *United States* v. *Paducah Towing, Inc.*, 692 F.2d 412, 422-23 (6th Cir. 1982), the court imposed a duty, within the scope of section 351, to moor a vessel properly for anticipated conditions. In the present case, Captain Horton did not take a "precaution . . . required . . . by the special circumstances of the case" when he failed to notify the lockmaster that he believed the flotilla was experiencing an unusual amount of surging. Thus, this Court finds that Chotin was contributorily negligent in causing the collision resulting in damages to the barges.

Having found contributory negligence by Chotin, the Court must now determine to what degree damages should be apportioned between the parties. In *Alter* the

plaintiff tug owner was found to be ninety percent negligent and the Government was found to be ten percent negligent when plaintiff sued the United States for damage to its motor vessel sustained when the vessel collided with a Government-owned dam. The factors the *Alter* court considered in finding plaintiff tug-owner negligent were that first, the plaintiff had entrusted the tow to an inexperienced pilot in bad weather, and second, the backing maneuver that caused the collision was done without an order from the lock operator. The *Alter* court also found the language of 33 U.S.C. § 351 to be important:

> Nothing in the rules . . . shall exonerate any vessel, or the owner or master or crew thereof . . . of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

This section has been interpreted to require that "even if a lock operator gave an erroneous order for a tug to back down from a forebay, the pilot cannot escape liability when he knows that such a order would be dangerous to his tow." 412 F. Supp. at 80. The Court found the Government ten percent negligent because the lockmaster should not have remained silent, as he did, when he saw that the pilot intended to carry out what the lockmaster considered a dangerous navigational maneuver. Similarly, the apportionment of damages issue was addressed by the Court of Appeals for the Eighth Circuit in *Logan Charter Service, Inc.* v. *Cargill, Inc.*, 373 F.2d 54, 58 (8th Cir. 1967). There, the Government locktenders were found to be free of negligence and the negligence of the tug crew was found to be the sole proximate cause of the collision.

In both *Alter* and *Logan Charter*, crews caused damage to the vessels when navigating into the lock. The *Logan Charter* opinion, citing *Rebel Towing* v. *United*

States, No. 64-H-67 (S.D. Tex. Oct. 29, 1965), suggests that the liability for the collision might be apportioned differently when the collision occurred after the two had entered the lock and "control [had been] turned over to the lockmen." In *Rebel Towing*, the Government was found to be 100% at fault for a collision between a lock and barge. *Rebel Towing*, slip op. at 11-12. Chotin urges that *Rebel Towing* stands for the proposition that the master and crew of a vessel are relieved of navigational responsibilities once the vessel and two are moored within the lock chamber. This Court is convinced, however, after reviewing the *Rebel Towing* opinion, that the facts of that case do not support such a broad reading of the opinion.[8]

Rebel Towing is distinguishable from the instant case because in *Rebel Towing* the barges were "dumb" barges without their own power and were entirely dependent upon the tug for navigation. Therefore, once the barges were tied off in the lock chamber, they were under the control of the lockmaster and not in control of the tug.

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[8] In *Rebel Towing*, the entire flotilla could not fit into the lock chamber. Therefore, the lock operator instructed the crew of the tug to double lock. In double locking, the tug pushes the flotilla into the lock chamber as far as possible and then one set of barges is uncoupled from the other. The second set of barges is backed out of the chamber by the tug. The first set of barges is locked through without the tug, pulled out of the chamber by a winch, and tied off. Finally, the tug and second set of barges is locked through and picks up the first set to proceed on its journey. When the accident occurred in *Rebel Towing*, the first set of barges was in the lock chamber, unaccompanied by the tug. The court found negligence because the lock operator should have ordered the flotilla to double trip, rather than double lock. Double tripping is similar to double locking except when double tripping the tug accompanies each set of barges through the lock; this is considered a safer procedure than double locking. Also, in *Rebel Towing*, the lock operator had negligently attached the two haulage cable. The *Rebel Towing* Court found that the lock operator's fault was the sole cause of the collision and that the tug and barges were guilty of no fault which contributed to the collision.

This was not so in the instant case. The Keegan navigated the barges into Wilson Lock and controlled the barges during the lockage. Therefore, *Rebel Towing* cannot be used to support Chotin's assertion that the crew of the flotilla had no responsibility once the flotilla was secured in the lock chamber.

Similarly, Chotin's contention that it had no further responsibility once the flotilla was tied off in the chamber cannot stand in the face of the language of the statutes and regulations applicable to the operation of Wilson Lock. Title 33 of the Code of Federal Regulations, § 407.300, which imposes duties on the lockmaster, also contains the following statement in paragraph (g):

> The restrictions and admonitions contained in these regulations shall not affect the liability of the owners and operators of floating craft for any damage to locks or other floating structures caused by the operation of such craft.

Therefore, Chotin's responsibility continued even after the flotilla was secured in the lock chamber.

In view of Chotin's violation of duties imposed by 33 U.S.C. § 351 and 33 C.F.R. § 207.300(g) and given that such violations were proximate causes of the collision, Chotin is not entitled to recover from the United States the full amount for damage to its barge. Because the statutory violations of the tug's crew and the lockmaster were proximate causes of the damage to the barge, liability must be apportioned between the two parties. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975). In *Reliable Transfer*, the United States Supreme Court held that for maritime collision cases "liability . . . is to be allocated among the parties proportionately to the comparative degree of their fault." *Id.* at 411. The court further explained that when it is not possible to measure the comparative degree of fault, liability for damages should be allocated equally. *Id.* In-

deed, it is not possible in this case to allocate fault. Therefore, the Court concludes that liability should be divided equally between the parties. Chotin is entitled to recover fifty percent of its damages for the barge on its claim against the United States under 46 U.S.C. §§ 741-752.

III.

The Court next turns to the Government's claim against the tug and barges pursuant to 33 U.S.C. §§ 408, 411 and 412. Section 408 makes unlawful the destruction of any work built by the United States for the preservation and improvement of navigable waters. Section 411 provides criminal penalties for violation of section 408 and section 412 allows the Government to recover civil damages from vessels injuring its locks or other structures.

The vast majority of cases that have construed §§ 408, 411 and 412 have held that they impose strict liability. *See, e.g., United States* v. *Tug Collette Malloy*, 507 F.2d 1019, 1022-23 (5th Cir. 1975). *See also United States* v. *Central Soya, Inc.*, 697 F.2d 165, 168 (7th Cir. 1982) ("there is no requirement that negligence be shown as the statute has been interpreted to be one of strict liability"); *United States* v. *Logan & Craig Charter Service, Inc.*, 676 F.2d 1216, 1219-20 (8th Cir. 1982) (as long as the vessel was the cause of the damage it is liable); *United States* v. *Commercial American Barge Line Co.*, 424 F.Supp. 453, 456 (E.D. Mo. 1977) (penalty must be imposed "regardless of the negligence of the owners or masters of the vessel."); *Hill* v. *George Engine Co.*, 190 F.Supp. 417, 419 (E.D. La. 1961) (liability is imposed by section 408 "without regard to fault or negligence."); *United States* v. *The Tug Terry E. Buchanan*, 138 F. Supp. 754, 755-56 (S.D. N.Y. 1956); *United States* v. *The Republic*, 64 F.Supp. 373, 376-78 (S.D. Tex. 1946).

Several cases, however, have suggested that in certain instances the liability imposed by the Act may not be

absolute. In *United States* v. *Tug Collette Malloy*, 507 F.2d 1019 (5th Cir. 1975), the Court of Appeals for the Fifth Circuit indicated that a private party could avoid liability if the Government were 100% at fault. Also, in *Rebel Towing*, No. 64-H-67, *slip op.* at 12-13, the court found that the United States could not recover against vessel owners for damage to its lock where the Government was 100% at fault for the collision.

The Sixth Circuit Court of Appeals, in an order deciding a motion for rehearing in *Hines, Inc.* v. *United States*, 1977 A.M.C. 1035, struck the word "absolute" from its original opinion in that case. The *Hines* court explained that the word "absolute" was removed to avoid the suggestion that liability could be imposed on a shipowner "for damages occasioned not by the shipowner but by the acts of others (including the United States government) for which the shipowner is *in no way* responsible." *Id.* (Emphasis added). Chotin contends that this language means that the Sixth Circuit now permits the doctrine of comparative fault to apply to claims brought under § 408. This Court disagrees. The language of the Sixth Circuit does not seem to go beyond that of the Fifth Circuit in *Tug Collette Malloy*; the *Hines* court is only allowing for avoidance of liability under the Act when the Government is 100% at fault. Thus, it appears that when there is negligence on the part of the party seeking to avoid liability under the Act, strict liability is imposed, even when the Government is also negligent.

Congress enacted the Rivers and Harbors Act, of which sections 408, 411 and 412 form a part in 1899, "for the preservation and protection of the navigable waters of the United States." *United States* v. *Central Soya, Inc.*, 697 F.2d 165, 168 (7th Cir. 1982). This goal of the Act has been cited as the reason for imposing strict liability upon a vessel that damages a government structure within the meaning of section 408. "[T]he purpose of the combined effect of [these sections] is to provide funds for the

replacement and maintenance of improvements built by the United States. This purpose is implemented by an absolute liability standard." *United States* v. *Ohio Valley, Inc.*, 510 F.2d 1184, 1188 (7th Cir. 1975).

Chotin urges this Court to extend the doctrine of comparative negligence to claims under section 408, as federal courts sitting in admiralty have done in strict products liability cases. Chotin has referred this Court to the recent case of *Lewis* v. *Timco, Inc.*, 716 F.2d 1425 (5th Cir. 1983). The *Lewis* case did not construe 33 U.S.C. §§ 408, 411 and 412. The *Lewis* court, in a rehearing *en banc*, decided that "the maritime principle of comparative fault is applicable in maritime cases that urge strict liability for defects in products." *Id.* at 1427. The application of the doctrine of comparative fault was upheld even though a panel of the Fifth Circuit had held previously that the district court had erred in applying the doctrine.

In its rehearing *en banc*, the Fifth Circuit reasoned that:

> "comparative fault has long been the accepted risk-allocating principle under the maritime law, a conceptual body whose cardinal mark is uniformity. These values of uniformity, with their companion quality of predictablility, a prized value in the extensive underwriting of maritime risks, are best preserved by declining to recognize a new and distinct doctrine without assuring the completeness of its fit. The Court is persuaded that the fit within general maritime principles of a doctrine of strict liability for defective products without comparative fault would be uneven at best."

Id. at 1428. More generally, the *Lewis* court said that admiralty courts will look to common law tort developments when applying principles of maritime law. The appellate court qualified this statement, however, by in-

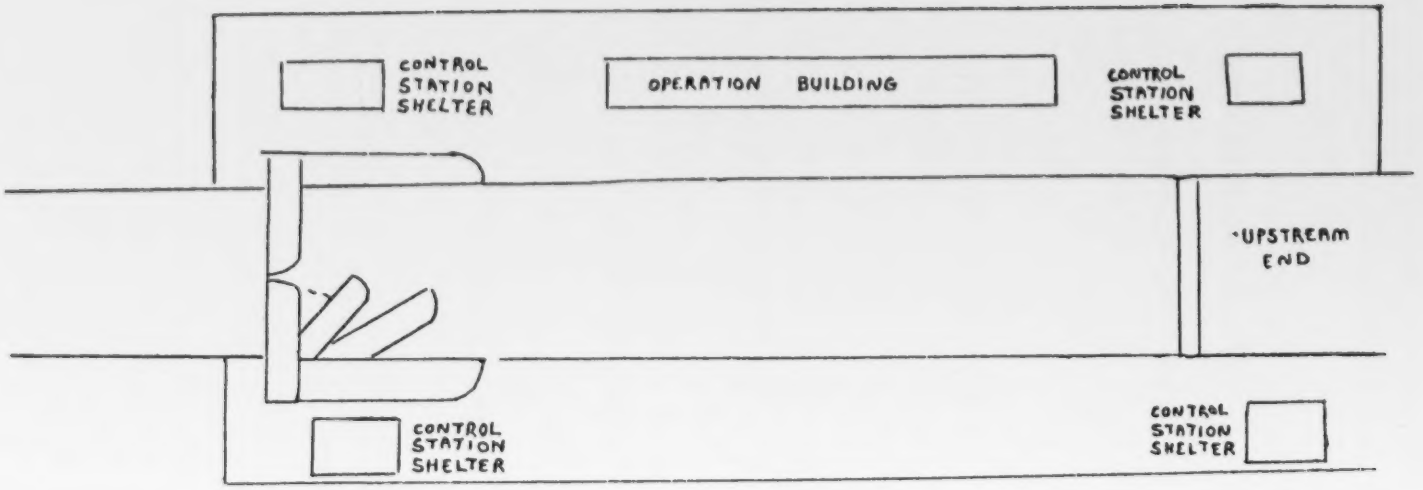
dicating that extension of general tort law concepts to admiralty is not permissible when "a policy determination has been made by the Congress." *Id.* at 1427 (citing *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978), holding that plaintiffs may not recover for "loss of society" under general maritime law because their measure of damages was limited by the Death on the High Seas Act to pecuniary loss)). A policy determination has been made by Congress that funds must be provided for the replacement of government locks. The courts have determined that this policy is best implemented by imposing liability on vessels that collide with such government structures, even when the Government is partially at fault. In the face of this Congressional policy, this Court cannot extend the principle of comparative fault to claims under 33 U.S.C. § 408. It is clear from the great weight of authority that Chotin cannot escape the liability imposed by section 408 *et seq.*, unless the Government is found to be 100% responsible for the damage. Because Chotin was found to be fifty percent at fault for the collision, the Government was not solely at fault. Therefore, Chotin is responsible for 100% of the damages to the lock.

In conclusion, the United States is entitled to recover 100% on its claim for damages to Wilson Lock. Chotin is entitled to recover fifty percent of its claim for damages to Barge Chotin 3390. An appropriate ORDER will be entered in accordance with this Memorandum.

This the 12th day of June, 1984.

/s/ [Illegible]
United States District Judge

APPENDIX I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CONTROL STATION SHELTER

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 84-5652, 85-5138

CHOTIN TRANSPORTATION, INC.,
Plaintiff-Appellant,
Cross-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,
Cross-Appellant.

On Appeal from the United States District Court
for the Middle District of Tennessee

Decided and Filed February 19, 1986

Before: KEITH and KRUPANSKY, Circuit Judges; and EDWARDS, Senior Circuit Judge.

EDWARDS, Senior Circuit Judge, delivered the opinion of the Court, in which KEITH, Circuit Judge, joined. KRUPANSKY, Circuit Judge, (pp. 15-23) delivered a separate opinion concurring in part and dissenting in part.

EDWARDS, Senior Circuit Judge. This is an admiralty case. These appeals are brought by both parties named above in a dispute over damages to Barge 3390 owned by Chotin Transportation, Inc. (henceforth Chotin) and damages to the upstream gates of the Wilson Lock on the

Tennessee River owned and operated by the United States. The accident occurred in the nighttime on January 20, 1982—a rainy and foggy night.

Chotin 3390 was the lead unit of a barge train consisting of Chotin's tug M/V Francis R. Keegan and its two barges Numbers 3390 and 1794. The facts as found by the District Judge indicate that all parties concerned had to be aware of the heightened problems of navigating the lock imposed by rain and fog and the 13½ foot total clearance available after this 586½ foot barge train had entered this 600 foot lock.

The initial cause of action was brought by Chotin under the Suits in Admiralty Act 46 U.S.C. § 741-752 (1920) (Admiralty Act). Chotin alleged that the government's negligence caused the damage to Barge 3390. The government responded with a third-party complaint in rem against all three vessels of the Chotin barge train under the River and Harbors Act 33 U.S.C. §§ 408, 412 for damages to the upstream miter gate. It also seeks the penalty authorized by 33 U.S.C. § 411 (1899).[1]

The District Judge found the facts as follows:

The District Court's Findings of Fact

During the evening of January 20, 1982, the flotilla comprised of the tug M/V Keegan, Barge 1794 and Barge

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[1] The United States had also counterclaimed against the Chotin vessels in personam for damages but as the District Judge's opinion notes "*By agreement* the government's *in personam* negligence claim was dismissed with prejudice on Chotin's motion at the close of the government's case." The District Judge also pointed out that "the government conceded it had presented no proof to allow it to recover on an affirmative negligence claim." But the District Judge also stated that the dismissal did not preclude the government from defending the suits in admiralty claims on the basis of the Chotin vessels' contributory negligence nor did it prevent the United States from possible recovery for damage to its lock under 33 U.S.C. §§ 408 and 412.

3390 arrived at the Wilson Lock. The night was foggy and rainy. Captain Horton, the pilot of the tug, radioed Lynn Wallace the only lock operator on duty that night for permission to enter the lock. Wallace opened the lock's downstream gates, and authorized Keegan and tow to enter the lock chamber. Once in the chamber, Horton brought the Keegan and tow to a stop alongside of and parallel to the lock's land wall, and approximately 4 to 5 feet from the upper "miter" gate. The proofs revealed that it is customary to secure a flotilla in a lock chamber by only two lines. One line is a towing line which prevents forward movement, and one is a backing line which prevents backward movement. The Keegan's crew then secured the flotilla to the lock's land wall. In this instance, the lead on the towing line was too long and the crew had to change it to a backing line. Captain Horton then reversed the Keegan's engines to remove the slack from the backing line. First mate Stewart then reported to the Captain that the lines were secure. Horton returned the Keegan's throttles to neutral, thereby equalizing the stress on the two lines. Horton then reported to Wallace, the lock operator, that the flotilla was secure.

At this lock in an upstream lockags, the lockmaster is about 90-100 feet above the flotilla when the lines are tied. Wallace from the tower of the downstream control room could only see the stern of the Keegan. When he was satisfied that the flotilla was tied far enough forward to allow the downstream miter gates to close, he closed the gates. Wallace did not visually check the mooring lines. Horton testified that after the downstream gates were closed, the flotilla could have been moved astern to allow more room between the head of the lead barge and the upstream lift gate, but this was not done. Once the downstream gates were closed, the fog became denser and visibility worsened. Wallace testified that he could not see the mooring lines nor the distance between the end of the tow and the upstream gate. Wallace turned on the lock's filling valve from the lower control station and

boarded a motor scooter and headed toward the upstream control station. He made a stop at the lock's main building, located between the downstream and upstream control stations to pick up a newspaper to deliver to the barge crew. Wallace then proceeded to the lock's second mooring bit which was located approximately 54 feet downstream from the upstream gate. Wallace attempted to examine the mooring line, but could not do so. Visibility was so bad that Wallace could not see four Keegan crew members who were standing on the deck tending the mooring line. Wallace continued to the next mooring bit located approximately 54 downriver from the upstream gate. Once again he was unable to see the mooring lines or the head of the tow. Wallace decided to stop the flow of water into the lock. He went to the upper control station but was unable to get in because his key would not work.

While Wallace was traveling from the lower control station to the upper control station, the flotilla was experiencing "surging." (The tug and tow are moving upstream and downstream in the chamber). A certain amount of surging is expected and occurs even when the flotilla is moored properly. The first episode of surging occurred when the water first began to enter the chamber. Crew member Gaston noticed some slack in the towing line and retied the line on Barge 3390. Horton testified that he thought the first episode was more severe than usual and he engaged the starboard engine astern to "hold it back." First mate Stewart then walked forward to check the distance between the bow of Barge 3390 and the upstream gate. At that time, the bow was not in danger of hitting the upstream gate and he did not check the towing line. Approximately eight minutes later another episode of surging occurred which lasted approximately six to eight minutes. It was caused by the filling valves automatically increasing their openings for a 15 foot lift of the barge train. Horton did not call the lock operator

to inform him of the surging, but waited for Wallace to notify him if something was amiss.

When the tow rose to a few feet below the gate, first mate Stewart saw the reflection of the tow's running light on the gate and realized that the bow of the lead barge was close to the gate. Stewart sent deckhand Russel to examine the extreme forward edge of the two to determine the clearance. Russell reported that impact was imminent. Stewart called Horton who engaged the engine astern to back the flotilla away from the upper gate. Horton then attempted to call Wallace to shut off the water. By then, it was too late to avoid impact. The bow of Barge 3390 struck the upstream lift gate. The water continued to rise along with the stern of Barge 3390 and the rest of the flotilla. The bow of Barge 3390 became stuck under the gate. As a result, the coupling between Barge 3390 and Barge 1794 broke and the bow rake of Barge 3390 disconnected.

After trial to the court on June 12, 1984 the District Court entered its opinion and judgment order and held: 1) Applying maritime comparative negligence principles, the District Court found the United States 50% liable for Chotin's damages because the lockmaster breached his duties found in 33 C.F.R. 207.300 to control and manage the lock and to direct and supervise mooring operations of the Keegan and her tow during lockage. Chotin was found to be 50% contributory negligent in causing the damage to the Barge by failing to manage and operate the Keegan and its two barges properly during the lockage. 2) The in rem third-party defendants were found to be strictly liable under 33 U.S.C. §§ 408 and 412 for all of the United States' damages to its upstream lock gate. The net effect of these rulings was a recovery by the United States of $136,374.51 plus prejudgment interest. The judgment and order did not address assessment of the penalties against each offending vessel provided by 33 U.S.C. § 412. Chotin noticed its appeal from the District

Court's judgment on July 17, 1984. On August 8, 1984, the United States noticed its cross-appeal from that part of the judgment which found it liable to Chotin and the District Court's failure to assess the mandatory penalties provided in 33 U.S.C. § 412.

Neither party appears to contest the District Judge's findings of fact quoted above. Further the parties stipulated as to the damages to the barge and the lock. There is, however, strong dispute about the legal conclusions and judgments at which the District Judge arrived.

Discussion

As we noted at the beginning of this opinion, the duties of care in accomplishing this lockage were markedly heightened for both parties by dark of night, rain and fog, all of which hindered essential visibility for both the lockmaster and the captain and crew of the barge train. The lockage was further complicated by the minimal 13½ foot clearance after this 586½ foot barge train entered this 600 foot lock.

On a clear day the routine care which was provided by the parties might well have accomplished a passage without incident. Indeed the barge train did enter the lock and tie up safely. However, a major factor in every passage of such a train through this lock was control of the enormous forces required to lift the weight of the entire barge train a perpendicular distance of 90 to 100 feet in a relatively few moments.

Initially, positioning and tying up the barge train with the bow of the lead barge within 4½ feet of the upstream gate was obviously risky. Undertaking the second perpendicular lift of 15 feet, without first, eyeball crewman surveillance of the 4½ foot gap and second, immediate radio contact and control of the barge train by the Chotin Captain and similar observation and control of the waterflow by the lockmaster was, as found by the District Judge,

proximate negligence by each party. The specifics of such proximate negligence, as we find them to be, as to Chotin were that although it had a four man crew, no member of the crew was positioned so as to observe the effect of any forward surge created by the 15 foot lift until it was too late to give the Captain notice (by radio or signal) to engage the tug's engines to restrain the tow or to give timely notice to the Captain so as to allow notice to the lockmaster to cut off the inflow. The specifics of such proximate negligence, as we find them to be, as to the lockmaster were first, a failure to recognize that the barge train was not secured at as substantial a distance from the upstream lock gate as was practicable under the circumstances, second, a failure to direct the Captain of the barge train to station a lookout in radio or signal contact with him, third, a failure, to himself establish and maintain radio contact with the Captain during the inflow and fourth, his inability to open the door to the upper control station. In regard to these findings, see the extraordinary powers given to the lockmaster by the Secretary of the Army under 33 U.S.C. § 1 as quoted in Appendix 1 to this opinion.

We believe that the judgments of the District Court affirmed above represent as fair an assessment of the respective fault of the parties and as fair a division of the parties' damages as the law currently allows. We also believe that where the fault of the United States is such as to equal that of Plaintiff-Appellant Chotin, a result which as here makes the United States whole (or better than whole)[2] is obviously unfair.

We have not had cited to us nor do we find a maritime case exactly on point in relation to the facts of this case.

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[2] If the terms of 33 U.S.C. §§ 408 and 412 are followed literally, the United States will recover, in addition to its full damages, a criminal penalty of $500 to $2500. We believe these results would clearly be inequitable. As to 33 U.S.C. § 412, there certainly has been no criminal intent shown.

It is true that 33 U.S.C. §§ 408 and 412 clearly impose pecuniary penalties upon any "vessel" for damages done by it. The District Judge has read these statutes as prohibiting him from considering the 50% contribution to the negligence which caused this accident on the part of the United States in assessing damages to the upstream lift gate.

While this was clearly at one time the law, we do not believe that it any longer is. Two leading authorities have made the following argument for the Supreme Court to adopt the proportional fault doctrine without awaiting congressional action.

> [T]here is no reason why the Supreme Court cannot at this late date 'confess error' and adopt the proportional fault doctrine without Congressional action. The resolution to follow the divided damages rule, taken 120 years ago, rested not on overwhelming authority but on judgments of fact and of fairness which may have been tenable then but are hardly so today. No 'vested rights,' in theory or fact, have intervened. The regard for 'settled expectation' which is the heart-reason of . . . *stare decisis* . . . can have no relevance in respect to such a rule; the concept of 'settled expectation' would be reduced to an absurdity were it to be applied to a rule of damages for negligent collision. The abrogation of the rule would not, it seems, produce any disharmony with other branches of the maritime law, general or statutory. (footnote omitted).

G. Gilmore & C. Black *The Law of Admiralty* 531 (2nd Ed. 1975).

In the October term of 1974 the Supreme Court revisited the divided damages rule and held in place thereof, that the liability for damage occasioned by two or more parties should be "allocated among the parties proportionately to the comparative degree of their fault."

The case was *United States v. Reliable Transfer Company, Inc.*, 421 U.S. 397 (1975). The opinion was by Mr. Justice Stewart writing for a unanimous court. The holding of the case is:

> We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.

Reliable Transfer, 426 U.S. at 411.

We recognize, of course, that Barge 3390's collision with the upstream gate on the Wilson Lock was not a "collision" in the sense of a collision at sea involving two or more ships nor was it precisely a "stranding" as that term would normally be used in admiralty affairs. But certainly the episode partakes of each and we are able to ascertain no reason to fail to apply the equitable allocation called for by *Reliable Transfer* under the facts of our instant case.

We recognize, of course, that the United States has argued strongly that it is entitled to the benefit of the discretionary function exception. In this regard, the United States relies upon *U.S. v. S.A. Empresa De Viacoa Aerea Rio Grandense, (Varig Airlines)* —— U.S. ——, 104 S.Ct. 2755 L.Ed.2d 660 (1984). In *Varig* the Supreme Court discussed the differences between functions which trigger the discretionary function exception and those functions which do not. In *Varig*, the Supreme Court said:

> As in *Dalehite*, it is unnecessary--and indeed impossible—to define with precision every contour of

the discretionary function exception. From the legislative and judicial materials, however, it is possible to isolate several factors useful in determining when the acts of a Government employee are protected from liability by § 2680(a). First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. As the Court pointed out in *Dalehite*, the exception covers "[n]ot only agencies of government . . . but all employees exercising discretion." 346 U.S., at 33, 73 S. Ct. at 966. Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability.

Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.[11] Time and again the legislative history refers to the acts of regulatory agencies as examples of those covered by the exception, and it is significant that the early tort claims bills considered by Congress specifically exempted two major regulatory agencies by name. See *supra*, at ——. This emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act: Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions

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[11] Even the dissenters in *Dalehite* read the legislative history of the discretionary function exception as protecting "that type of discretion which government agencies exercise in regulating private individuals." *Dalehite v. United States*, 346 U.S., at 58, n. 12, 13 S. Ct., at 979, n. 12 (Jackson, J., dissenting).

> grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations." *United States v. Muniz*, 374 U.S. 150, 163, 83 S. Ct. 1850, 1858, 10 L.Ed.2d 805 (1963).

As we see this case, it does not by any means represent "second guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. The parties in this case admittedly faced with a serious emergency nonetheless were guilty of ordinary "garden-variety" negligence.[3] Understandable perhaps as these actions or inactions were on the part of the one lonely United States representative and the captain and crew of the barge team, they nonetheless consisted of failing to see what could readily have been seen, and do what could readily have been done to prevent the damage both to the barge and to the lock. Nor will requiring the United States to assume commensurate liability for damages to the ship and the lock gate, in our judgment, "seriously handicap efficient government operations." *Varig*, 104 S. Ct. at 2765.

In short, we believe that this case falls under the principles of *Reliable Transfer* and not under the principle of *Varig Airlines*.

---

[3] We recognize that the phrase "garden-variety" negligence was used by the Court of Appeals for the Fifth Circuit in *United States v. Tug Colette Mallory*, 507 F.2d 1019, 1022 (5th Cir. 1975), and that the Fifth Circuit went on to hold that "garden-variety" contributory negligence is not a defense to suit by the United States for damage to its property. The Fifth Circuit, however, was writing just two months before the decision of the Supreme Court of the United States in *Reliable Transfer*. If we were writing without *Reliable Transfer* before us, we too would decide this case as the Fifth Circuit decided *Tug Colette Mallory*.

We have considered the question of whether or not this calls for remand to the District Court because it failed to give effect to *Reliable Transfer*. We conclude that this is not necessary since the District Court has already plainly indicated its belief that an equal division of damages is as fair an approximation as it could make. Our review of the facts supports this conclusion and we certainly cannot declare clearly erroneous the District Court's findings of fact as to equal negligence on the part of both Chotin (and its vessels) and the United States.

The judgment of the District Court is then affirmed in part and reversed only as to allocation of damages to the upstream miter gate. As to this issue on remand, the District Court will assess 50% of the damage as determined above to the United States and 50% to the Chotin vessels involved in this accident and enter judgment accordingly.

APPENDIX I

33 U.S.C. § 1 provides:

> It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department . . . .

The regulations found in 33 C.F.R. 207.300(a) and (m)(1)(i) upon which the District Court predicated the Government's liability provide:

> (a) *Authority of Lockmasters.* The lockmaster shall be charged with the immediate control and management of the lock, and of the area set aside as the lock area, including the lock approach channels. He shall see that all laws, rules, and regulations for the use of the lock and lock area are duly complied with, to which end he is authorized to give all necessary orders and directions in accordance therewith, both to employees of the Government and to any and every person within the limits of the lock or lock area, whether navigating the lock or not. No one shall cause any movement of any vessel, boat, or other floating thing in the lock or approaches except by or under the direction of the lockmaster or his assistance. In the event of an emergency, the lockmaster may depart from these regulations as he deems necessary. The lockmasters shall also be charged with the control and management of Federally constructed mooring facilities.
>
> (m)(1) *Mooring. At Locks.* (i) All vessels when in the locks shall be moored as directed by the lock-

> master. Vessels shall be moored with bow and stern lines leading in opposite directions to prevent the vessel from "running" in the lock. All vessels will have one additional line available on the head of the tow for emergency use. The pilothouse shall be attended by qualified personnel during the entire locking procedure. When the vessel is securely moored, the pilot shall not cause movement of the propellers except in emergency or unless directed by the lockmaster. Tying to lock ladders is strictly prohibited.

KRUPANSKY, Circuit Judge, dissenting in part, concurring in part. Upon review of the majority opinion, I am constrained to concur, in part, and respectfully dissent, in part, for the reasons hereinafter set forth. Initially, I am concerned with the majority's conclusion to affirm the trial court's judgment in applying maritime comparative negligence principles and assessing 50% of the liability for Chotin's damages against the United States arising as a result of the lockmaster's negligence anchored in 33 C.F.R. 207.300 in failing to control and manage the lock and to direct and supervise mooring operations of the Keegan and her barge train during lockage; and in the trial court's finding that Chotin was 50% contributorily negligent in causing damage to barge #3390 by failing to manage and operate the Keegan and its barge train properly during the lockage.

I also join the majority in characterizing the negligent acts of the lockmaster as ordinary "garden variety" negligence not within the parameters of the discretionary exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a). A factual analysis discloses that the lockmaster's breach of duty in no way resulted from a policy judgment or policy decision implicit to invoking the discretionary exemption intended by Congress.

The government's reliance upon *U.S. v. S.A. Empresa De Viacao Aerea Rio Frandense*, (Varig Airlines) ——

U.S. ——, 104 S. Ct. 2755, 81 L.Ed.2d 660 (1984) to support its application of the discretionary exemption to the facts of this case is misplaced. *Varig Airlines* reaffirmed the Court's earlier interpretation of § 2680(a) articulated in the seminal case of *Dalehite v. U.S.*, 346 U.S. 15, 73 S. Ct. 956, 57, L.Ed. 1427 (1953). In *Varig Airlines* the Supreme Court recognized that:

> As in *Dalehite*, it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception.

—— U.S. at ——, 104 S. Ct. at 2765.

Having made that pronouncement, the Court proceeded to define the criteria against which the facts of any given case should be compared in resolving the protection afforded by the discretionary exemption imposed by § 2680 (a) of the Federal Tort Claims Act by stating:

> From the legislative and judicial materials, however, it is possible to isolate several factors useful in determining when the acts of a Government employee are protected from liability of § 2680(a). First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. As the Court pointed out in *Dalehite*, the exception covers "[n]ot only agences of government . . . but all employees exercising discretion." 346 U.S., at 33, 73 S. Ct., at 966. Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability
>
> Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government

> acting in its role as a regulator of the conduct of private individuals.

Id.

The inexhaustible line of citations relied upon by the government simply emphasizes the ad hoc application of facts to the *Varig Airlines* criteria to identify the discretionary exception.

Enjoining the dictates of *Varig Airlines* upon the developed facts of the instant case, I cannot, in conscience, conclude that the lockmaster's negligence on the night of January 20, 1982 involved executive and/or administrative decisions grounded in social, economic and political policies of the kind that Congress intended to safeguard from judicial second-guessing. In the case at bar, the government had exercised its policy by promulgating regulations to ensure the safe passage of vessels during the locking procedures. It was the lockmaster's negligent performance in ignoring the government's regulations that gave rise to the government's negligence in causing damage to Chotin's barge.

The government's attenuated interpretation of *Varig Airlines* would have this Court extend the discretionary exemption, without exception, to all governmental activities undertaken by governmental employees under circumstances involving the exercise of judgment. In noting that pragmatically all negligent conduct, to a greater or lesser degree, is the product of a voluntary election to perform an act I am constrained to observe that the government's suggested interpretation would confer the discretionary exception on all governmental activities and conduct that permitted or required the exercise of an election or option, which interpretation would be in derogation of the congressional intent incorporated into the FTCA and SIAA. In *General Public Utilities Corporation v. United States*, 745 F.2d 239, 245 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1227 (1985), a post-*Varig Air-*

lines, case, the Third Circuit demonstrated its understanding of *Varig Airlines*:

> The exemption from the Tort Claims Act is based on the nature of the governmental discretionary function, not whether there is an option to choose. Regulatory activities are within the exemption, not because alternatives exist in particular circumstances, but because of the fundamental character of the role assigned to the agency.

Likewise, in *Canadian Transport Company v. United States*, 663 F.2d 1081 (D.C. Cir. 1980), the D.C. Circuit recognized the existence of a discretionary function exception in the SIAA:

> The government appears to argue that if an action involves the exercise of judgment by a government employee, the action is discretionary and the United States is immune from suit. . . . Courts have recognized, however, that giving such a broad reading to the term "discretionary" would effectively immunize almost all government activity from suit under the FTCA.

663 F.2d at 1086. The government's proposed interpretation would effectively eviscerate the legislative intent reflected in the FTCA and the SIAA. In the case at bar the lockmaster abdicated his duties to immediately control and manage the locking procedure; to supervise the mooring of the vessel and the barge flotilla in the lock; to supervise the tying of the backing and towing lines during lockage; to check the distance between the head of the flotilla and the upstream left gate after the captain of the Keegan informed him that the flotilla had been secured in the chambers; to ultimately discontinue the locking procedure when it was obviously dangerous; to stop the flow of water into the chamber to prevent the disaster because, having forgotten the keys to the upper control chamber in the lower control station, he was un-

able to enter the upper control station to close the necessary valves. In sum, the lockmaster's performance from the inception of the locking procedure was nothing short of a comedy of errors. Accordingly, I would concur with the majority's conclusion that the lockmaster's conduct did not fall within the discretionary exception of the FTCA as urged by the government on this appeal.

I cannot, however, endorse the majority's interpretation of the Rivers and Harbors Act, 33 U.S.C. §§ 408 and 412 and the majority's disposition of the issue joined thereunder.

Those sections provide:

> It shall not be lawful for any person or persons to . . . alter, deface, destroy, move, injure, . . . *or any manner whatever impair the usefulness* of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, *or other work* built by the United States . . . for the preservation and improvement of any of its navigable waters or to prevent floods . . . (emphasis supplied). 33 U.S.C. 412—. . . And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft . . . and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof.

Initially, my dissent is predicated upon this Circuit's precedent articulated in *Hines, Inc. v. United States*, 51 F.2d 717, 724 (6th Cir. 1977), a case factually analogous to the instant case, wherein it was unequivocally announced "Section 408 imposes strict liability, as compared to § 409's requirement of negligence. Section 412 also

provides that 'any boat, vessel . . . or other craft used or employed in violating any of the provisions of sections . . . 408 and . . . of this title . . . shall be liable for . . . the amount of the damages done by said boat, vessel or other craft . . .'" See *United States v. Tug Colette Mallory*, 507 F.2d 1019 (5th Cir. 1975).

Hines, Inc. thereupon proceeded to favorably adopt the Seventh Circuit's rationale enunciated in *United States v. Ohio Valley Co., Inc.*, 510 F.2d 1184 1188 (7th Cir. 1975):

> [T]he purpose of the combined effect of sections 14 and 16 [33 U.S.C. §§ 408 and 411] is to provide funds for the replacement and maintenance of improvements built by the United States. This purpose is implemented through an absolute liability standard. Thus, it would be wholly inconsistent to apply the limitation of liability provisions of section 183(a) to the absolute liability provisions of section 14, while at the same time not applying them to section 15 (wreck statute) [33 U.S.C. § 409] which speaks in terms of "voluntary or carelessly" allowing a vessel to sink. Furthermore, section 183(a) speaks in terms of lack of "privity and knowledge." That phrase implies that the owner be unaware of the fault in his vessel that caused an accident. Since the triggering mechanism for section 183(a) limitation of liability is tied to an awareness of negligence, and because negligence is not significant in actions under sections 14 and 16, it follows that the limitation of liability provisions are inapplicable to those sections.

The pronouncements of the Seventh Circuit in *United States v. Ohio Valley Co.* and the Sixth Circuit's resolution of *Hines, Inc. v. United States* were echoed by the Eighth Circuit in *United States v. Logan and Craig Charter Service*, 767 F.2d 1216 (8th Cir. 1982) wherein that court further analyzed the purpose of the Rivers and Harbors Act, 33 U.S.C. §§ 408 and 412:

> The purpose of the Act is to protect, preserve, and make safe the Nation's navigable waterways, and the United States is the principal beneficiary of the Act. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 201, 88 S. Ct. 379 [385], 19 L.Ed.2d 407 (1967). The Act should be construed broadly to effectuate its goals. *Wyandotte Transportation Co. v. United States, supra; United States v. Republic Steel Corp.*, 362 U.S. 482, 80 S. Ct. 884, 4 L.Ed.2d 903 (1960). Congress imposed strict liability under sections 408 and 412 in order to provide funds for the replacement and maintenance of improvements made by the United States; to interpret those sections in such a way as to limit liability would be inconsistent with the intention of Congress.

573 F.2d at 997.

As early as 1906, the First Circuit laid to rest challenges to the Rivers and Harbors Act in *New England Dredging Co. v. United States*, 144 Fed. 932, 933 (1st Cir. 1906), wherein it elaborated on the purpose underlying the congressional promulgation when it explained:

> If the view of the United States is upheld, it is by virtue of the modern body of law, existing in this country, as well as in England, which is founded upon the arbitrary but necessary police power inherent in government, rather than upon general principles which govern in other cases.
>
> This exceptional rule, founded largely upon statutes enacted for the enforcement of the plenary power in government is recognized as applying to . . . a variety of conditions relating to the public health and public good.
>
> As to wrongs within this rule, the penalty is supposed to attach to the offending act without regard to the question of willfulness or intent, and without

> regard to the question of mistake or innocence. The rule is, of course, in derogation of the principles of the common law, and its drastic quality is justified upon grounds of necessity, and as in the interest of the public good.
>
> The expressed object of resorting to the exercise of plenary power through arbitrary and exceptional remedies in such matters, is to better safeguard the public good in situations where the public good is easily subject to imposition and injury through heedless, inadvertent, or indifferent violations of laws enacted for the general welfare . . . .

Thus, having declared that strict liability under 33 U.S.C. §§ 408 and 412 of the Rivers and Harbors Act arises from a violation of the above statutes and not pursuant to common law negligence and having further declared that the trial court properly assessed 50% of the liability proximately contributing to the damage of the upper miter gate of the Wilson Lock on the Tennessee River against Chotin, it must, pursuant to the mandate of the statutory language, reimburse the government for the entire cost of the damage to the described miter gate.

Chotin argues that the following dicta in *United States v. Tug Collette Mallory*, has in some way eroded the interpretations of strict liability attributed to 33 U.S.C. §§ 408 and 411:

> Defenses to the strict liability imposed by these statutes are not well-developed; however, we have no doubt that if the tug had shown the gate man to be solely at fault in causing the accident a defense would have been established.

507 F.2d at 1022. These arguments, however, are not persuasive because the cited reference, in my opinion, does not abuse the conclusion of strict liability imposed by § 408 and 411 of the Act. The precise language of

those sections forecloses Chotin's contentions. The pertinent specifications in the respective sections read as follows:

> 33 U.S.C. § 408. It shall not be lawful for *any person or persons to* . . . alter, deface, destroy, move, injure,
>
> . . .
>
> 33 U.S.C. § 411. Every person and every corporation that shall violate, . . .
>
> 33 U.S.C. § 412—. . . . Any any boat, vessel, scow, raft, or other craft *used or employed in violating any of the provisions of sections* 407, 408, and 409 of this title *shall be liable for* . . .

Mindful of the congressional intent to make the government the principal if not the sole beneficiary of the Rivers and Harbors Act, it is obvious from the foregoing, that the strict liability imposed by the above sections is directed toward any culpable persons and/or corporations that ". . . alter, deface, destroy, mover, injure, . . . or in any manner whatsoever impair the usefulness of any sea wall, bulkhead, jetty, wharf, pier or other work built by the United States . . ." except the United States, even under circumstances where the government contributed in some greater or lesser degree to said damage. Accordingly, it must necessarily follow that under the circumstances wherein the government was the sole and only cause of the damage to its property and the ship owner was free of any negligence whatsoever, the vessel owner is not a person or corporation within the meaning and intent of the above cited sections. Stated differently, total governmental culpability affords a compatible complete defense if not the only defense to the strict liability imposed by the Act.

I would therefore reaffirm the pronouncements of strict liability imposed by 33 U.S.C. §§ 408, 411 and 412 as

interprted by this Court in *Hines, Inc. v. U.S.* and all other circuits that have addressed the issue [1] and affirm the trial court's disposition to require Chotin to assume payment for the total amount of the repairs to the upstream miter gate of the Wilson locks situated on the Tennessee River.

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[1] The majority would support the application of comparative negligence principals by assessing 50% of the damages to the upstream miter lock against the United States by citing to *United States v. Reliable Transfer, Inc.*, 421 U.S. 397, 975. Initially, as the majority opinion notes the collision of barge #3390 with the upstream miter gate of the Wilson lock was not a "collision" at sea involving two or more ships nor was it a "stranding" as that term is applied under admiralty law. Moreover, the *Reliable Transfer, Inc.* decision was not impacted by a strict liability congressional enactment designed to benefit the United States. I find no factual or legal comparison between the instant case and *Reliable Transfer, Inc.*

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-5652
No. 85-5138

CHOTIN TRANSPORTATION INC.,
Plaintiff-Appellant,
Cross-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,
Cross-Appellant.

[Filed June 17, 1986]

ORDER

Before: LIVELY, Chief Judge, ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, CONTIE, KRUPANSKY, WELLFORD, MILBURN, GUY, NELSON, RYAN, and BOGGS, Circuit Judges

A majority of the Judges of this Court in regular service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket as a pending appeal.

Accordingly, it is ORDERED that the previous decision and judgment of this Court is vacated, the man-

date is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as practicable.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Docket No. 82-3342

CHOTIN TRANSPORTATION INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant, Counter-Claimant and Third-Party Plaintiff

vs.

M/V FRANCIS R. KEEGAN, Her Engines Tackle, Appurtenances, Etc. In Rem: Barge Chotin 3390, Her Appurtences, Tackle, Engines, Etc. In Rem: and Barge Chotin 1794, Her Appurtenances, Tackle, Engines Etc., In Rem: and Chotin Transportation, Inc.

ORDER

Pursuant to the accompanying Memorandum of Law judgment enters for Chotin on its action against the Government and judgment enters for the Government on its counter claim against the Keegan, Barge Chotin 3390 and Barge Chotin 1794. Accordingly, Chotin shall recover fifty percent of its damages to Barge Chotin 3390 in the amount of $109,957.91. The United States shall recover in full for damages to Wilson Lock in the amount of $246,332.42. Therefore, it is ORDERED that the United States receive a net recovery of $136,374.51, plus prejudgment interest. Each party is to bear its own costs.

Entered this the 12th day of June, 1984.

/s/ [Illegible]
United States District Judge

STATUTORY PROVISIONS INVOLVED

33 U.S.C. § 408:

"It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece or plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works: *Provided*, That the Secretary of the Army may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest: *Provided further*, That the Secretary may, on the recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation or use of any of the aforementioned public works when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work."

U.S.C. § 412:

"Any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 407 of this title to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and

permitted by the Secretary of the Army, or who shall willfully injure or destroy any work of the United States contemplated in section 408 of this title, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section 409 of this title, shall be deemed guilty of a violation of this Act, and shall upon conviction be punished as provided in section 411 of this title, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harmor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof."

Supreme Court, U.S.
FILED
OCT 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-374

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHOTIN TRANSPORTATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Hines, Inc. v. *United States*, 551 F.2d 717 (6th Cir. 1977) 3

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) 6

New England Dredging Co. v. *United States*, 144 F. 932 (1st Cir. 1906) 3-4

United States v. *Logan & Craig Charter Service, Inc.*, 676 F.2d 1216 (8th Cir. 1982) 3, 4

United States v. *Ohio Valley Co.*, 510 F.2d 1184 (7th Cir. 1975) 3

United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975) 2, 5, 6

United States v. *Tug Colette Malloy*, 507 F.2d 1019 (5th Cir. 1975) 3, 4

Wyandotte Transportation Co. v. *United States*, 389 U.S. 191 (1967) 6

Statutes:

Death on the High Seas Act, 46 U.S.C. 761 *et seq.* 6
46 U.S.C. 766 6

Jones Act, 46 U.S.C. 688 ..... 3, 6

Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 *et seq.* 1
33 U.S.C. 408 ..... 2, 3, 4, 5, 6
33 U.S.C. (1964 ed.) 409 6
33 U.S.C. 412 ..... 2, 3, 4, 5, 6

Suits in Admiralty Act, 46 U.S.C. 741 *et seq.* 1

Pub. L. No. 99-662, § 939(a), 100 Stat. 4199 6
33 U.S.C. 1801 4
33 U.S.C. 1802 4
45 U.S.C. 53 6

Miscellaneous:

4 F. Harper, F. James & O. Gray, *The Law of Torts* (2d ed. 1986) 5

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that comparative negligence standards should be imposed under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 *et seq.* [hereinafter Rivers and Harbors Act], even though that Act, as the courts of appeals have uniformly held, imposes strict liability on owners of vessels that damage government property.

1. This case arose when one of petitioner's barges collided with a gate in a lock chamber built and operated by the Army Corps of Engineers on the Tennessee River. Petitioner brought suit under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, alleging that the government's negligence caused damage to its barge. The government brought an action against petitioner under the Rivers and Harbors Act, seeking recovery for the damage to its lock.

The district court found that each party was equally negligent. Specifically, it found that petitioner's employees failed to take the necessary precautions to ensure that its flotilla remained secure while in the lock chamber, and that the government's lockmaster failed to direct the

mooring of the vessels in the lock (Pet. App. 37a-45a). With respect to petitioner's claim under the Suits in Admiralty Act, under which comparative negligence principles apply (*United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975)), the district court held (Pet. App. 44a-45a) that petitioner was entitled to recover half of the damage to its barge. With respect to the government's claim under the Rivers and Harbors Act, the court held that petitioner was strictly liable under 33 U.S.C. 408 and 412.[1] It accordingly ordered petitioner to pay for all of the damage to the lock (Pet. App. 48a).

A divided panel of the court of appeals reversed (Pet. App. 50a-61a), holding that comparative negligence principles should be applied under both statutes. The Sixth Circuit, however, granted rehearing en banc and vacated the panel's decision (*id.* at 73a-74a). It then affirmed the district court's judgment that petitioner is liable for all the damage to the lock (*id.* at 1a-18a). The Sixth Circuit concluded that Sections 408 and 412 impose a strict liability standard, and found no basis in the statute for application of comparative negligence principles (Pet. App.

---

[1] Section 408 provides:

> It shall not be lawful for any person or persons to * * * alter, deface, destroy, move, injure, * * * or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States * * * for the preservation and improvement of any of its navigable waters * * *.

Section 412 provides:

> * * * any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred * * *.

10a-13a). The court also rejected petitioner's contention that this Court's decision in *Reliable Transfer* compels the application of comparative negligence principles (*id.* at 14a-15a). That case did not involve a congressional enactment imposing strict liability, the court explained, but instead involved matters "governed by common law rules of admiralty which the Supreme Court was free to modify" (*id.* at 15a).[2]

While acknowledging that Sections 408 and 412 incorporate a strict liability standard, the dissenting judges (Pet. App. 19a-28a) nevertheless found the application of comparative negligence standards appropriate (*id.* at 19a-26a). They reasoned that common law admiralty tort principles counselled in favor of the imposition of comparative negligence principles (*id.* at 22a-25a).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

As the court of appeals observed, every circuit addressing the question has concluded that Sections 408 and 412 impose strict liability on vessels that damage river and harbor improvements. *Hines, Inc.* v. *United States*, 551 F.2d 717, 724 (6th Cir. 1977); *United States* v. *Logan & Craig Charter Service, Inc.*, 676 F.2d 1216, 1219-1220 (8th Cir. 1982); *United States* v. *Ohio Valley Co.*, 510 F.2d 1184, 1186 (7th Cir. 1975); *United States* v. *Tug Colette Malloy*, 507 F.2d 1019, 1022-1023 (5th Cir. 1975); see *New England*

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[2] The court of appeals similarly found cases in the admiralty products liability area inapposite (Pet. App. 15a-17a n.5). The court emphasized that those cases involved principles of common law tort liability, not—as here—liability arising from the violation of a strict liability statute. The court also rejected the contention that the Jones Act, 46 U.S.C. 688, somehow mandates that comparative negligence principles apply under the Rivers and Harbors Act (Pet. App. 17a-18a n.5).

Dredging Co. v. *United States,* 144 F. 932, 933 (1st Cir. 1906). Those courts have recognized, as did the court below, that Congress imposed a strict liability standard in order to provide funds for the repair and maintenance of river and harbor improvements (Pet. App. 13a). This statutory strict liability is in essence a form of user fee imposed by Congress to help defray the cost of providing navigational aids and improvements for which the government does not charge directly. Petitioner and other barge operators benefit disproportionately from these improvements, and it was entirely reasonable for Congress to direct that they should pay for all damages to such improvements caused by accidents in which they are involved, rather than sharing this burden with federal taxpayers.[3] Accordingly, no court of appeals has held that comparative negligence principles apply under Sections 408 and 412.[4]

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[3] In 1978, Congress enacted a tax on liquid marine fuels to preserve the navigability of inland and intercoastal waterways. 33 U.S.C. 1801, 1802. That tax, like Sections 408 and 412, helps defray expenses associated with the maintenance of these waterways. The existence of the tax does not, however, as petitioner suggests (Pet. 12), change the express purpose of the Rivers and Harbors Act, which is to place the damages done by the offending vessel "to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred" (33 U.S.C. 412).

[4] Both the Fifth and Eighth Circuits, in agreement with the en banc court here, have concluded that the government's contributory negligence is irrelevant under the strict liability inquiry of Sections 408 and 412. In *Tug Colette Malloy*, the court, after finding that both parties were contributorily negligent, declared that "whether the United States was in no way negligent or contributorily negligent is immaterial" (507 F.2d at 1022-1023). Similarly, in *Logan & Craig Charter Service, Inc.*, the court noted evidence establishing the government's probable negligence, but nonetheless found that this factor was not pertinent to the strict liability inquiry under Sections 408 and 412 (676 F.2d at 1219-1220).

There is nothing in the language of Sections 408 and 412 that indicates that a comparative negligence analysis was intended by Congress. To the contrary, Section 408 provides that no one shall "alter, deface, destroy, move, injure, * * * or in any manner whatever impair the usefulness of any" improvement on the navigable waters, and Section 412 provides that any vessel used in violating Section 408 is liable "for the amount of the damages done." Moreover, those provisions were enacted in 1899. It has long been the rule that contributory negligence is not a defense to a strict liability claim, and it has been suggested only recently that comparative negligence principles have any bearing in strict liability cases. 4 F. Harper, F. James & O. Gray, *The Law of Torts* 304-313 (2d ed. 1986). The Congress that enacted Sections 408 and 412 in 1899 clearly did not envision that comparative negligence principles would apply to limit the government's recovery under the strict liability provisions it enacted.

Petitioner's reliance on products liability cases is misplaced (Pet. 11-12). The Sixth Circuit rightly distinguished those cases since they involved common law torts not controlled by specific congressional enactments (Pet. App. 15a-17a n.5).[5] Similarly, contrary to petitioner's assertion (Pet. 9-11), this Court's decision in *Reliable Transfer* has no bearing on this case. There, the Court held that comparative negligence principles, rather than the divided damages rule, would apply in admiralty tort actions. Noting that "[t]he precise origins of the divided damages rule are shrouded in the mists of history" (421 U.S. at 401 (footnote omitted)), the Court declared: " 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law. No statutory or

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[5] In addition, comparative negligence principles have found much greater acceptance in products liability cases than in other areas of strict liability. 4 F. Harper, F. James & O. Gray, *supra*, at 310-318.

judicial precept precludes a change in the rule of divided damages.' " *Id.* at 409 (citations omitted). Here, in contrast, there is a statute that imposes strict liability on vessels that damage river and harbor improvements.[6]

Nor is there any merit to petitioner's contention (Pet. 7-8) that Congress's enactment of comparative negligence principles in the Jones Act, 46 U.S.C. 688, and the Death on the High Seas Act, 46 U.S.C. 761 *et seq.*,[7] compels adoption of comparative negligence principles under the Rivers and Harbors Act (Pet. App. 18a n.5). To the contrary, the fact that Congress has mandated the use of comparative negligence principles under other Acts, but has not adopted it in Sections 408 and 412, supports the conclusion that comparative negligence rules do not apply in cases brought under those Sections.

Finally, petitioner's invocation (Pet. 8-9) of *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), is similarly misplaced. In *Moragne*, the Court relied on subsequent

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[6] Petitioner erroneously cites *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), for the proposition that the Rivers and Harbors Act incorporates principles of comparative fault (Pet. 4). In concluding that the Act permits the government to remove wrecks from the navigable waters and then seek reimbursement from the vessel owner, the Court was addressing 33 U.S.C. (1964 ed.) 409, which at the time imposed liability on persons who "voluntarily or carelessly sink" vessels (see 389 U.S. at 197). Congress subsequently deleted "voluntarily or carelessly" from Section 409, so that it now imposes liability on persons who "sink" vessels. Pub. L. No. 99-662, § 939(a), 100 Stat. 4199.

[7] The Jones Act rule of recovery is set forth in 45 U.S.C. 53, which provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." Similarly, the Death on the High Seas Act provides that "the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly" (46 U.S.C. 766).

statutory changes as one reason for overruling a federal common law maritime rule precluding actions for wrongful death. Petitioner would have this Court rely on subsequent statutes to change the settled meaning of an Act of Congress. This amending function, we suggest, is one that should be performed by the legislative rather than the judicial branch.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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